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# REPORT OF CASES

DECIDED IN THE

## COURT OF QUEEN'S BENCH,

BY

CHRISTOPHER ROBINSON, Q.C.,

BARRISTER-AT-LAW AND REPORTER TO THE COURT.

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VOL. XXX.

CONTAINING THE CASES DETERMINED  
FROM EASTER TERM, 33 VICTORIA, TO HILARY TERM, 34 VICTORIA,  
WITH A TABLE OF THE NAMES OF CASES ARGUED,  
A TABLE OF THE NAMES OF CASES CITED,  
AND DIGEST OF THE PRINCIPAL MATTERS.

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J U D G E S

OF THE

COURT OF QUEEN'S BENCH,

DURING THE PERIOD OF THESE REPORTS.

---

THE HONORABLE WILLIAM BUELL RICHARDS, C.J.  
" " JOSEPH CURRAN MORRISON, J.  
" " ADAM WILSON, J.

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*Attorney-General :*  
THE HON. JOHN SANDFIELD MACDONALD.



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REPORT OF CASES  
IN THE  
COURT OF QUEEN'S BENCH.

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EASTER TERM, 33 VICTORIA, 1870.

(From May 16 to June 4, 1870.)

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*Present :*

THE HON. WILLIAM BUELL RICHARDS, C.J. (a)

“ “ JOSEPH CURRAN MORRISON, J.

“ “ ADAM WILSON, J.

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WETHERALL V. GARLOW ET AL.

*County Court—Jurisdiction—Law Reform Act, 1868.*

Where a County Court cause is entered for trial at the Assizes under the Law Reform Act of 1868, the jurisdiction is the same only as if it had been tried in the County Court. Where in such a case, therefore, the title to land came in question, and a verdict was entered for defendant : *Held*, that the proceedings were *coram non judice*, and the verdict was set aside.

THIS was an action brought in the County Court of the County of Norfolk. The declaration was in trespass *quare clausum fregit*, and for cutting down a quantity of wheat, &c., and carrying away the same.

*Pleas*—Not guilty ; and that the plaintiff was not possessed of the land.

The case was entered for trial under the provisions of 32 Vic., ch. 6, at the last Autumn Assizes for Norfolk, before Adam Wilson, J.

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(a) The Chief Justice was absent during the first two days of the term.

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From the evidence given on the part of the plaintiff, he relied upon proving a possessory title to the land to support his case, which was denied by the defendants; and at the close of the plaintiff's case the defendants' counsel moved for a nonsuit, on the ground that the plaintiff proved no title, but that the title was in the Crown, and that the defendants were in possession cropping the land in question. The learned Judge doubted his authority to try the case, it appearing that the title was in issue, the contest being whether the plaintiff or defendants had title by possession. He however allowed the cause to proceed, reserving leave to both parties to raise the question of jurisdiction, or the right to a verdict, or other final proceeding, and also reserved leave to enter a nonsuit.

The defendants then advanced testimony to establish a possessory right to the land, and to cut the wheat, &c. The case went to the jury on the issues raised, the learned Judge intimating at the same time his opinion that he had no jurisdiction. The jury being unable to agree on the question of title, the learned Judge advised a verdict by consent for one party, with leave to the other to enter a verdict, and asked the jury to find the amount of damages, irrespective of the right to recover, which they valued at \$98.

The learned Judge then entered a verdict for defendants (as his opinion on the question of jurisdiction was against the plaintiff), with leave to the plaintiff to move to enter a verdict in his favor, if the Court should think there was jurisdiction to try or proceed with the cause.

During last Michaelmas Term, *Harrison*, Q.C., obtained a rule *nisi* to set aside the verdict, and to enter a verdict for the plaintiff for \$98; or why, if there was no jurisdiction to try the cause, the verdict should not be set aside and proceedings stayed, or such order made as might be necessary. In the following term, *S. Richards*, Q.C., shewed cause.

*Harrison*, Q.C., supported the rule, citing *Lawford v.*

*Partridge*, 1 H. & N. 621 ; *Powley v. Whitehead*, 16 U. C. R. 589 ; 32 Vic., ch. 6, O. ; 33 Vic., ch. 7, sec. 10, O.

MORRISON, J.—It is quite clear from the pleadings and the issues raised, and the testimony produced on the part of the plaintiff and defendants at the trial, that the right of possession and the title to the land in defendants was brought in question. The 16th section of the County Courts Act, Consol. Stat. U. C., ch. 15, enacts that that Court shall not have cognizance of any action where the title to land is brought in question.

It is beyond doubt that if the case had been brought to trial before the County Court Judge in his own Court, his duty would have been to refuse to proceed with the cause, as being one clearly beyond his jurisdiction ; and the only question now is, whether the case being tried at *Nisi Prius*, under the provisions of the Law Reform Act of 1868, makes any difference. We think not. The sole object and intention of that Act was to provide for the trial of issues and assessment of damages in County Court actions, merely substituting the presiding Judge at *Nisi Prius* for the Judge of the County Court ; and that such is the case is quite apparent from the 10th section of the 33 Vic., ch. 7, amending the Law Reform Act of 1868, which enacts that, whenever it shall appear in any action otherwise of the proper competency of the County Court, that such Court has not cognizance thereof from the title to land being brought in question, &c., it shall be lawful for any judge of either of the Superior Courts of Common Law, &c., to order a writ of *certiorari* to issue out of one of the Superior Courts of Common Law to remove such cause into such Court, &c.,

It is therefore clear that the proceedings at the trial before my brother Wilson were *coram non iudice*, and as the verdict entered cannot be sustained, we have now to make such order as will place the parties in the position they would have been left in at the trial if the learned judge had declined to proceed with the cause on the ground of want

of jurisdiction, that is, to set aside the verdict without costs, and making no further order.

WILSON, J., concurred.

*Verdict set aside.*

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PETERS v. WELLER.

*Attorney—Liability.*

Where an attorney received money to invest in real estate security, *Held*, that he was liable for the want of reasonable care as regarded the value of the security, and that his responsibility was not confined to the examination of title.

DECLARATION—That in consideration that the plaintiff retained the defendant as and being an attorney and solicitor, for reward to the defendant, to invest certain money of the plaintiff for him, at interest, upon good and sufficient security, defendant promised the plaintiff that he would invest the said money for the plaintiff at interest upon good and sufficient security, yet defendant invested the money upon bad and insufficient security, whereby a large part thereof, and of the interest which had accrued thereon, became lost to the plaintiff, and the plaintiff was put to great cost, charges, and expenses, in trying to recover the same.

The second count averred a retainer of defendant, being an attorney, for reward, to invest money at interest upon good and sufficient security, and that defendant, as and being such attorney and solicitor, accepted said retainer, yet defendant so negligently and improperly invested the said money, and invested the same upon such bad and insufficient security, that a large part thereof, and of the interest which had accrued thereon, was lost to the plaintiff, and the plaintiff was put to great costs, and charges, and expenses in striving to recover the same.

Third count—that in consideration that the plaintiff would retain and permit the defendant, as and being an attorney and solicitor, for reward to the defendant, to

invest the sum of \$1800 of the plaintiff's for him in real estate security at ten per cent. interest, the defendant promised the plaintiff that he would invest the same for the plaintiff in real estate security at ten per cent. interest, yet he did not invest the said \$1800 in real estate security, whereby a large part thereof was lost to the plaintiff, and the plaintiff was put to great costs and expenses in striving to recover the same.

*Pleas*—1. To first count, that defendant did not promise as alleged.

2. To first count, that he did not invest said money on bad and insufficient security as alleged.

3. To second count, not guilty.

4. To second count, that the plaintiff did not retain defendant, nor did defendant accept the retainer as alleged.

5. To the last count, that defendant did not promise as alleged.

6. To the last count, that defendant did invest the said sum of \$1800 upon real estate security.

Issue.

The cause was tried before Morrison, J., without a jury, at Peterborough, in November last.

The plaintiff produced a receipt signed by defendant, in the following words: It was dated Peterborough, January 26th, 1862, but it was admitted that it ought to be 1863: "\$1800. Received from John W. Peters, Esq., eighteen hundred dollars, to be invested in real estate security, at ten per cent. interest." The receipt was admitted.

A mortgage was proved, dated 27th January, 1863, from John Maloney and wife, of the one part, and the plaintiff of the other part, to secure the payment of \$1800 on the 27th January, 1866, with interest at ten per cent. per annum, payable half yearly. The mortgage covered the west half of lot 24 in the sixth concession of the Township of Ops, 100 acres; the south half of lot 10 in the first concession of Douro, 100 acres; and the west half of lot 9 in the first concession of Douro. It was admitted that this was the investment made of the \$1800 by defendant for plaintiff.

A witness was called, who was about to speak of the value of these lands, when the evidence was objected to by defendant's counsel, on the ground that the question of value was not raised by the pleadings, and he referred to *Hayne v. Rhodes*, 8 Q. B. 342.

The plaintiff's counsel contended to the contrary, and asked to amend the declaration so as to set out the receipt in the pleadings, and charge a duty to enquire into the value of the property. Defendant's counsel objected to the amendment as raising a question which would call for a demurrer to decide it. The learned Judge declined to allow the amendment. On the authority of the case referred to, he held that the plaintiff could not recover in that form of action; and as the point was important, he gave leave to the plaintiff to move to set aside the non-suit.

In Michaelmas Term last, *C. S. Patterson* obtained a rule *nisi* accordingly, on the ground that there was evidence of a retainer to use diligence in procuring security sufficient in value, and the learned Judge should have received the evidence of value; and because the amendment asked for at the trial should have been allowed. The rule was enlarged until this term, when

*Hector Cameron* shewed cause. Good and sufficient security means sufficient in point of law: *Hayne v. Rhodes*, 8 Q. B. 345. The two first counts only complain of defendant not obtaining good and sufficient security, and if this only means good and sufficient in law, no evidence of insufficient value could be given under them; and no evidence was offered as to the third count. The receipt itself creates no obligation to investigate the value. The non-suit was therefore right: *Howell v. Young*, 5 B. & C. 259; *Dartnall v. Howard*, 4 B. & C. 344; *Whitehead v. Greatham*, 2 Bing. 464; *Harman v. Johnson*, 2 E. & B. 61.

*C. S. Patterson*, contra. *Hayne v. Rhodes* is badly reported. The plaintiff there was nonsuited because the learned Chief Justice at the trial thought that the con-

tract, as laid in the declaration, included an undertaking on the part of the defendants to ascertain the value of the premises, and being of opinion no such undertaking could be created by the mere retainer, and none was shewn by the evidence, he nonsuited the plaintiff. Patteson, J., said : "I think the undertaking charged was to ascertain that the title was good, and that it was a sufficient security. These are not necessarily the same things. A title may be good, and yet, from its nature, insufficient as a security ; for instance, if the party had a perfectly legal title, but only for a short term. The two phrases do not therefore mean the same thing, although the latter phrase does not comprehend an undertaking to enquire into the value." In that case, too, the particular security was agreed upon, and the case where an attorney is to find the security is distinguished in argument, and *Dartnall v. Howard*, 4 B. & C. 345, is cited, which shews that in such a case it is the duty of the attorney to find good security. The decision in this last case, however, turned upon the insufficiency of the declaration. In this case it was pressed on the learned Judge that to allow the declaration to be amended, charging an undertaking to look to the value of the security, would make the declaration demurrable, and that the case in 8 Q. B. was authority for that. That, however, is a mistake. The case of *Harman v. Johnson*, 2 E. & B. 61, cited by Mr. Cameron, shews that attorneys in England do receive moneys as scriveners to invest for their clients ; and the like practice prevails here to a much greater extent. *Howell v. Young*, 5 B. & C. 259, though not expressly deciding the liability of an attorney for insufficient security for a loan, seems to imply such liability. *Chapman v. Chapman*, L. R. 9 Eq. 276, may also be referred to.

RICHARDS, C. J., delivered the judgment of the Court.

We think this nonsuit should be set aside.

It is well known that clients leave money with their

attorneys to invest for them, without the clients knowing to whom the loan is to be given, or the nature of the security. The dicta of the Judges in *Harman v. Johnson* shew that when the money is paid over in this way the attorney in fact acts as a scrivener, and they frequently do act as scriveners in the full sense of the term. Lord Campbell said, in that case: "I think an attorney, *quà* attorney, is not a scrivener: that his business is to act in a Court of Law, to prepare conveyances, to examine titles, and so on, but not to act as a scrivener. A scrivener has to hold the money put into his hands until he has an opportunity of laying it out; but this employment of scrivener is not a consequence of his character of attorney.

\* \* \* Attorneys frequently do act as scriveners in the full sense of the term." Baron Wood, in *Hutchinson v. Gascoigne*, 1 Holt 507, held that attorneys, at times, substantially carried on the business of scriveners.

When they do act in that capacity they must be bound to exercise a reasonable amount of care and attention in making investments for their clients. In this case the defendant does not appear to have been asked by his client to draw a mortgage to secure the repayment of money that he was about to lend to a person who wished to borrow it; nor does it appear that defendant told him he had a client who wished to borrow the sum of \$1800, and mentioned who he was, and the security that would be given for it; nor in fact that he knew of any one then who wished to borrow the money. The receipt signed by the defendant, and apparently in his handwriting, is to the effect that he has received the \$1800 from the plaintiff, to be invested in real estate security for him, at ten per cent. interest. Surely there is an implied undertaking here to exercise reasonable care in investing the plaintiff's money.

*Chapman v. Chapman*, L. R. 9 Eq. 276, seems to lay down the doctrine that a solicitor would be answerable for gross negligence in the investing of money, but when the solicitor acts on the opinion of competent surveyors as to

the value of property, and those opinions are submitted to the client, he would not be liable.

In *Adams v. Malkin*, 3 Camp. 539, Sir Vicary Gibbs, C.J., gives a sketch of the business and office of scrivener. He remarks: "It is related in the life of Dr. Johnson that a person who went by the name of Jack Ellis was the last of the profession. He was a cotemporary of Johnson, and is mentioned by him with great respect. At the present day the banker occupies one department of the business of the scrivener by being the depositary of the money, and the attorney the other, by drawing the securities."

The plaintiff also shewed at the trial that the money was paid to the defendant himself on the cheque of the plaintiff, so the whole transaction appears to have been carried out through the defendant. Some of the cases say that, even declaring against an attorney as such, he may be answerable for not obtaining security sufficient in value, when it appears, from the consideration mentioned in the title deeds, that a *prima facie* case of insufficiency would be made out.

*Green v. Dixon*, 1 Jur. 137, is an express authority in favor of the plaintiff's right to recover under the facts shewn.

On the whole, we think the plaintiff should have been allowed to amend his declaration, and the rule will be absolute to set aside the nonsuit, and grant a new trial without costs, with leave to the plaintiff to amend his declaration.

*Rule absolute.*

AUSTIN V. THOMAS FARMER, ROBERT BOND, AND  
JAMES FARMER.

*Promissory note—Conditional endorsement—Pleading.*

Where a note not signed by any one was endorsed by defendant, and delivered by him to the plaintiff, upon condition that A. and B. should sign it as makers, and it was signed only by C. : *Held*, that these facts might be shewn by defendant under a plea denying his endorsement.

ACTION in the County Court of the County of Hastings, on a promissory note made by Thomas Farmer, on the 30th April, 1868, payable to defendant Bond, or order, for \$200, with interest at seven per cent., one year after date, endorsed by Bond to defendant James Farmer, and by him to plaintiff.

*Pleas*—By Thomas Farmer, payment ; by Robert Bond, that he did not endorse as alleged.

Judgment by default against the other defendant.

The cause was tried at the last assizes at Belleville, before Gwynne, J., without a jury.

The plaintiff called evidence to prove the handwriting of the defendant Robert Bond as endorser of the note. He also proved presentment and notice. Defendant's counsel admitted the handwriting of the endorsement, but alleged that it was made when no name was on the note as maker, and under the express stipulation that two persons, James H. Farmer and William Farmer, should make the note. The plaintiff's counsel contended this evidence could not be given under the plea, and the learned Judge was of that opinion. *Wallbridge*, Q.C., for defendants, desired leave to put in a plea setting up the above facts. The learned Judge declined admitting the plea at the trial, thinking the application should have been made on affidavit in the regular way in Chambers. Evidence was then tendered to the effect above stated, which the learned judge declined to receive. The defendants' counsel referred to *The Corporation of Huron v. Armstrong*, 27 U. C. R. 533. A verdict was rendered for the plaintiff for \$228.54.

*Spencer*, during this Term, obtained a rule for a new trial, on the ground of the erroneous ruling of the learned Judge, and the rejection of the evidence tendered, and upon affidavits.

*Diamond* shewed cause. Fraud must be pleaded, and could not be given in evidence under the plea that the defendant did not endorse. It must be presumed the plaintiff held for value: *Foster v. Mackinnon*, L. R. 4 C. P. 704. In *Awde v. Dixon*, 6 Ex. 869, there was a special plea setting up the facts. *Marston v. Allen*, 8 M. & W. 494; *County of Huron v. Armstrong*, 27 U. C. R. 533.

There were no affidavits filed in reply on the facts.

*Spencer*, contra. The affidavits filed on behalf of Bond shew clearly that he only endorsed on the representation that the note, which then had no signers to it, was to be signed by William Farmer and James Henry Farmer, for whose accommodation alone he was endorsing. Bond did not endorse this note, nor ever intended to endorse it, and therefore, under the plea that he did not endorse, he can well give the facts in evidence. If the plaintiff were an innocent holder for value, it might be necessary to set up the facts by a plea, but as between the parties the authorities shew that it is not necessary: *Pym v. Campbell*, 6 E. & B. 370; *Bell v. Lord Ingestre*, 12 Q. B. 317; *Steele v. Harmer*, 14 M. & W. 831; *Hayes v. Caulfield*, 5 Q. B. 85; *Lloyd v. Howard*, 15 Q. B. 995; *Halifax v. Lyle*, 3 Ex. 446.

RICHARDS, C. J., delivered the judgment of the Court.

In *Awde v. Dixon*, 6 Ex. 869, it appeared that defendant's brother, Richard Dixon, being desirous of borrowing £100, on the security of a promissory note, applied to defendant to become one of his sureties, which he agreed to do on the representation of his brother that one Robinson would become his co-surety, and that defendant should not be responsible unless Robinson joined in the note. On the faith of this representation, defendant signed a note

filled up as a joint and several note, with a blank to fill in the name of the payee, for £100. Defendant signed, leaving a space for Robinson's signature. Robinson refused to sign, and Richard Dixon took it in its imperfect state to the plaintiff, and upon his, Richard Dixon's, representation that he had authority to deal with it, the plaintiff advanced his money upon it, and the blanks were filled up with the date and the plaintiff's name as payee. Alderson, B., said: "Here the defendant signed his name to a piece of paper giving his brother authority to make it a promissory note on certain terms; he makes it a note on other terms; then how does that differ from the case of signing his brother's name? It would be strange if this transaction amounted to forgery, and yet we should hold this a true instrument." In that case the question was not discussed whether the point could be raised under *non fecit*, as there was a special plea setting out the facts.

In *Halifax v. Lyle*, 3 Ex. 452, Baron Parke, in giving judgment, said: "If the fact be that he accepted the bill, or made the note, leaving a blank for the payee's name, and the name was filled in without his authority, he ought to have denied the acceptance of the bill, or the making of the note."

In *Pym v. Campbell*, 6 E. & B. 371, in argument, it was stated, "So, where the holder of a bill writes his name on it, and hands it over, that is no endorsement, if it was done on the terms that it should not operate as an endorsement till a condition is fulfilled: *Bell v. Lord Ingestre*, 12 Q. B. 317; *Marston v. Allen*, 8 M. & W. 494. It is true a deed cannot be given as an escrow to the party, but that is for purely technical reasons, inapplicable to parol contracts." In that case Erle, J., said: "If it be proved that in fact the paper was signed with the express intention that it should not be an agreement, the other party cannot fix it as an agreement upon those so signing."

In *Bell v. Lord Ingestre*, 12 Q. B. 319, Lord Denman speaks of the delivery of the bill as an escrow, and adds: "It is a singular sort of escrow; for the bills were delivered

to the parties who, in the event of their performing a certain act, were to be benefited by them."

Crompton, J., in *Pym v. Campbell*, 6 E. & B. 374, refers to the question of escrow when there is a deed, and when the contract is by parol. He says: "When the instrument is under seal, it cannot be a deed until there is a delivery; and when there is a delivery that estops the parties to the deed; that is a technical reason why a deed cannot be delivered as an escrow to the other party. But parol contracts, whether by word of mouth or in writing, do not estop. There is no distinction between them, except that where there is a writing it is the record of the contract."

Many of the cases speak of the delivery of notes and incomplete instruments as escrows, and the analogies of incomplete executions of deeds are referred to in many of them. In the very late case of *Foster v. Mackinnon*, L. R. 4 C. P. 704, where the defendant was induced to endorse a bill, supposing he was merely giving a guaranty, the analogy to the execution of deeds was argued upon, and it was stated that he never intended to sign, and in contemplation of law never did sign the contract to which his name was appended. In that case the defendant denied the endorsement, and also shewed that it was obtained by means of a fraudulent representation. But according to the judgment of the Court it seems certain the defence would come under he did not endorse.

Here, this endorsement was delivered to the plaintiff himself in the nature of an escrow, only to take effect as an endorsement on the notes being signed by William Farmer and James Henry Farmer. He therefore, in fact, never endorsed these notes as they now are, nor ever authorized any one to use his signature, to make him liable for the notes on which it is now contended he is an endorser.

We think he can properly shew these facts in an action between this plaintiff and himself, who was the very person to whom the incomplete documents were delivered, and who may be considered as holding each one as an escrow until it was signed by the proper persons.

The cases referred to and language cited in *The Corporation of Huron v. Armstrong*, shew that no particular words are necessary to constitute the delivery of a writing an escrow; all the facts connected with the transaction may be looked to for that purpose. *Young v. Austen*, L. R. 4 C. P. 553, may also be looked at as one of the late cases about promissory notes, varied by the terms of cotemporaneous agreements. See also *Hogg v. Skeen*, 18 C. B. N. S. 426.

We think the rule should be made absolute without costs.

*Rule absolute.*

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#### HOGAN AND WIFE v. AIKMAN.

*Seduction—C. S. U. C. ch. 77—Right of Action.*

Declaration by husband and wife, that the defendant, after the death of the father of K., seduced said K., then being the daughter and servant of the wife, while the said K. was unmarried, *and residing with the defendant*, and not with her said mother, whereby the mother lost her services, &c.

*Held*, that the declaration was good: that the action would lie; and that it was unnecessary to state that the seduction took place before the mother's second marriage, for if essential to the action, the plaintiff, under the declaration, must prove it.

DECLARATION.—For that the defendant, after the passing of an Act known as chapter seventy-seven of the Consolidated Statutes of Upper Canada, and after the death of the father of Mary Keegan hereinafter named, debauched and carnally knew the said Mary Keegan, then being the daughter and servant of the plaintiff Ellen Hogan, while the said Mary Keegan was an unmarried female residing with the said defendant herein, and not with the said Ellen Hogan, her mother, whereby the said Mary Keegan became pregnant with child, and the plaintiff Ellen Hogan lost the services of the said Mary Keegan for a long time, and incurred expense in nursing and taking care of her and about the delivery of the said child.

Demurrer, on the grounds, 1. That it is not alleged in the declaration whether the cause of action arose before or

after the intermarriage of the plaintiff Ellen Hogan with the plaintiff Michael Hogan, and if after said intermarriage said plaintiff Ellen Hogan could not have a servant at common law, or under the statute mentioned in the declaration, and could therefore lose no service. 2. That said declaration is repugnant and bad, for stating that said Mary Keegan was at one and the same time the servant of the plaintiff Ellen Hogan, and yet residing with the defendant. 3. That the declaration does not allege either that the said Mary Keegan was the legitimate daughter of the plaintiff Ellen Hogan, or that the plaintiff Ellen Hogan was ever married to the father of the said Mary Keegan.

*J. R. Martin*, for the demurrer. *Idington*, contra.

The authorities cited are referred to in the judgment.

RICHARDS, C. J., delivered the judgment of the Court.

The question is this: Is the mother, whose child is seduced, deprived of the action given by our statute for such seduction, because at the time of such seduction the daughter was residing with the seducer?

The section of the statute, Consol. Stat. U. C., ch. 77, sec. 1, reads thus: "The father, or in case of his death, the mother of any unmarried female who has been seduced, and for whose seduction the father or mother could sustain an action in case such unmarried female were at the time dwelling under his or her protection, may maintain an action for the seduction, notwithstanding such unmarried female was, at the time of her seduction, serving or residing with another person, upon hire or otherwise."

The preamble to the original Act, 7 W. IV., ch. 8, which I have referred to, commences, "Whereas in some cases the law fails in affording redress to parents whose daughters have been seduced." The section 1 of the original Act reads thus: "That the father, or in case of his death, the mother of any unmarried female who may be seduced, after the passing of this Act, and for whose seduction such father or mother could sustain an action in case such unmarried female were at the time dwelling under his or her protec-

tion, shall be entitled to maintain an action for seduction, notwithstanding such unmarried female was at the time of her seduction serving or residing with any other person, upon hire or otherwise, any former law or statute to the contrary notwithstanding."

The decided cases on the point raised by this demurrer necessary to be referred to, are as follow :

*Whitfield v. Todd*, 1 U. C., R. 223, in which the learned Chief Justice, Sir John B. Robinson, said : " It does not appear on the record that *the* Isaac Whitfield suing here is the husband of the mother, and if it did, the mother must nevertheless be joined, in order that the action might survive to her in case of her husband's death." The plea, which was held good, set up that the female seduced was the unmarried daughter of a woman living in the province, and that the father of the girl seduced was dead, and the action had been brought before the expiration of six months from the birth of the child.

*Lake et ux. v. Bemiss*, 4 C. P. 430. The declaration was held bad, because it did not allege that the father of the female seduced was dead. The difficulty of framing a declaration when the mother and her second husband sued for the seduction of the wife's daughter was alluded to, and the case of *Devlin and wife v. Brown* was referred to, as shewing that the action could be maintained when the father was dead, and the mother had married again, and the daughter had been seduced after such second marriage.

The late Chief Justice Draper of this Court refers to this last case of *Devlin and wife v. Brown* in *McIntosh v. Tyhurst*, 23 U. C. R. 568, and says : " The declaration was special. The case is not reported, but I have a brief note of it. After the first trial a rule *Nisi* was granted for a new trial, or to arrest the judgment, because the declaration stated that the female seduced was the daughter of Mary Brown, one of the plaintiffs, by a former marriage : that defendant seduced her, and that the action was brought within six months after the birth of the child : that the mother was married to the other plaintiff ; and the objection taken was,

that the declaration shew'd no ground for joining him in the action. The Court made the rule absolute for a new trial on the grounds stated in affidavits, and the plaintiffs obtained a second verdict, which was moved against, but the Court refused a Rule *Nisi*."

In *McIntosh v. Tyhurst*, 23 U. C. R. 565, the plaintiff sued for the seduction of his step-daughter, whose mother he had married. He declared in the common form as master, she residing with him, alleging loss of service, and suing within six months of the birth of the child, the mother of the girl seduced being then resident in Upper Canada, and at the time of her seduction living in the plaintiff's house, where the seduction took place. The plaintiff himself was part of the time living at home, and part of the time away. He was not at home when the girl was seduced. He and her mother were then living apart. The plaintiff was away at his work. He and her mother had disagreed. Before her seduction the plaintiff occasionally wrote and sent money home. He was working in Paris about a year, and came home about two weeks before the trial. It was held the action was brought by the plaintiff too soon, under the statute, if brought as master: that it could not be treated as the mother's right of action that he was suing for, for in that case she should have been made a plaintiff, with her husband joined for conformity, and *semble* the declaration should have been special. The child was born on the 10th October, 1863, and the action was commenced on the 23rd February, 1864, before six months had expired. A new trial was granted.

On the new trial objections were taken to the plaintiff's right to recover, in effect the same as urged on the argument and in the judgment. The case nevertheless went to the jury, who found for the plaintiff. On that a new trial was moved for, on the ground of misdirection, in leaving the case to the jury, notwithstanding the objection that the mother of the girl seduced was living in the province, and the plaintiff had commenced this action within six months of the time of the birth of the child.

The case is again reported in 24 U. C. R. 443, and decided by the same Judges, and the Court there held that the action would lie. The learned Chief Justice, in giving judgment, said: "Nor do I think that the Legislature, when they passed this Act, had in view such a state of facts as exists in the present case—namely, the death of the father, leaving his wife and an unmarried daughter him surviving, the second marriage of the mother, who takes her daughter with her as an inmate of her new home, and the seduction of the daughter while living at the step-father's." The learned Chief Justice then further states an opinion of the statute, which it is contended applies to the case before us, and is fatal to the plaintiff's right to recover, viz.: "The intention which I assume the Legislature to have entertained—namely, to secure a prior right of action to the father or mother of the female seduced, and to postpone to it the Common Law right of action of a third party, with whom such female resided as a servant when she was seduced—can hardly, I think, be held to extend to a case where the mother, to whom the statutory right of action is only given after the death of the father, marries a second time. I think it too much to say, in construing the first section, that on the facts appearing this girl Jessie Tolmie was not residing with her mother, and that, as the consequence, by the first and third sections, the mother had for six months the prior right of action—treating the girl as residing with another person upon hire or otherwise."

The view here intended to be expressed, as I understand the language, and all that was necessary to the decision of the case, was, that the learned Chief Justice and the Court declined to hold that the girl seduced, when residing with her mother, (and of course her mother's husband) was not residing with another person upon hire or otherwise, so as to give the statutory right of action to the mother alone for six months, and this view seems the correct one from the words which follow, viz.: "I prefer holding that this particular case does not fall within the letter or spirit of the Act, and therefore that the step-father, whose servant she

was, as she resided in his family doing acts of service, can maintain this action at Common Law, unaffected and unfettered by any provision of the statute."

In *Green v. Wright*, 24 U. C. R. 245, the learned Chief Justice refers to the first decision of *McIntosh v. Tyhurst*, and in the course of his judgment indicates his view that the special right under the statute, to bring the action within the six months, is confined to those cases where the girl seduced was, at the time of her seduction, serving or residing with *another* person upon hire or otherwise. He adds, although the step-father was *another* person, and not one of the parents of the girl seduced, yet the marriage of the girl's mother to him, was proof that the girl was residing with her mother whilst she was serving and residing with him, so the case does not come strictly within the statute.

*Smith et ux v. Crooker*, 23 U. C. R. 84. The declaration charged the seduction of the wife's daughter by a former marriage, whilst living with her step-father, and alleged that she was the servant of the plaintiffs, and the plaintiffs lost her services. It was held on demurrer the declaration was bad.

*Hicks and wife v. Ross*, 25 U. C. R. 50, shews that an action will not lie by husband and wife for the seduction of the wife's illegitimate daughter, while residing away from the mother.

*Waters et ux. v. Powers*, 29 U. C. R. 336, merely follows *McIntosh v. Tyhurst*, and holds that the step-father can sue alone, and not the mother and step-father, when the girl is seduced when residing with the step-father.

*Cromie v Skene*, 19 C. P. 328, in which some of the provisions of the statute are discussed, does not apply to this case.

Whatever difference of opinion may exist on the construction of this Act, it seems to be conceded on all hands that the principal object the Legislature had in view, was to give the right of action to parents for the seduction of their daughters when residing away from home. And the

most revolting feature of the law as it formerly stood was, and still is in England, that the master with whom the female might be residing at the time of her seduction, was often himself the seducer, and yet no action could be maintained against him.

I do not find any decided case in our own Courts that an action will not lie against a defendant who seduces a girl residing with him, whose father is dead, and whose mother has married again.

It may be argued from some of the decided cases that such ought to be the decision under our statute, but it suffices for my present purpose that no such decision has yet been made, and I think in the cases to which I have referred, where the decisions come nearest to the views contended for by the defendant, the decision has gone on the express ground that the girl seduced did not, at the time of her seduction, reside with *another* person than her mother.

It may be well argued that the Legislature did not contemplate giving a special right to bring the action to parents when the daughter resided with them. That right existed at Common Law, and the step-father could always have brought the action for the seduction of his step-daughter, when she was living with him as a member of his family and his servant. But in the case before us no action could be brought at Common Law, because the female seduced was not the servant of the step-father or mother, and residing with them.

The object of our statute was to afford redress to parents whose daughters had been seduced, in cases where the existing law failed to give such redress. And the effect of the enactment, as I understand it, is to give the father, and, in the event of his death, the mother, the right to bring an action for the seduction of their daughter, though residing with another (or any other, as in the original Act), in all those cases where the father or mother could have brought the action if the daughter when seduced had been dwelling under the protection of the father or mother.

It is not necessary to read it that the action will only lie in those cases where, if the seduction had taken place in the mother's house, instead of in the place where it actually occurred, the action would lie. The section does not even speak of residing in the house of the father or mother, but only of dwelling under his or her protection.

I do not think, looking at the whole of the statute and the intention of the Legislature, that the mother should be deprived of the right to sue for the injury which she had sustained by the seduction of her daughter, merely because she may have married a second husband.

In this case the action could have been maintained if the daughter had been dwelling under the protection of her father, if living, not because she would have been his servant, for that fact would be assumed from his being her father. The statute seems to contemplate the mother having the same right in that respect as the father, after the death of the father. The words, too, in giving the right to bring the action are peculiar. They can sustain the action in case the female were at the time dwelling under his or her protection.

The latter part of the second section of the Act is as follows: "But in case the father or mother of the female seduced had, before the seduction, abandoned her, and refused to provide for and retain her as an inmate, then any other person who might at Common Law have maintained an action for such seduction, may maintain such action."

This shews that when the parents abandoned their child and refused to provide for her, or, in other words, when she was not dwelling under their protection, the action could be brought by any other person who might at Common Law maintain the action.

Taking the whole statute together, I think, under it, the mother of the female seduced, when the father is dead, has a statutory right to bring the action, and any service or loss of service necessary to maintain it will be presumed to be hers in her *quasi* representative capacity as mother, when the action is brought for the seduction of her daughter when residing with another person.

I do not pretend this view is free from doubt—on the contrary, there are great difficulties in carrying out the evident intention of the Legislature, consistent with the recognized principles of the Common Law applicable to this action; but I am not disinclined to carry out what I believe was the intention of the Legislature in passing this Act in this respect—to give to the mother, after the husband's death, the same remedy he would have had if living, to prosecute for the seduction of her daughter living with another person at the time of the seduction. I am less disinclined to seek reasons for thwarting that intention in a case like the present, where the defendant himself, who was her master and with whom she resided, is the seducer; and I think we may properly hold, in accordance with the views of those who interpreted the law shortly after it passed, when a similar action was maintained in *Devlin and wife v. Brown*, and with the expressed opinion in favor of that view by Sir John B. Robinson already referred to.

The language of the late Sir J. B. Macaulay, in *Lake v. Bemiss*, seems to favor the same view.

As to the formal objection, the want of the allegation that the seduction took place before the marriage of the plaintiffs, if it should be necessary to sustain the action that the seduction took place before the marriage, then the plaintiffs would be bound to prove it at the trial under the declaration. If the defendant wishes to raise that question on the record, he can do so by plea. Under the modern rules of pleading, I understand this is now the proper course. If in no view that can be presented of the matter, can the plaintiff recover, then you demur generally, and if the Court decide that in any view that can be taken the action will lie, the plaintiff will be bound to prove that view on the trial, or the verdict will be for the defendant (a). If the pleading is likely to embarrass, it may be amended at the cost of the party offending.

The second objection is one to the right given by the Legislature, and cannot be taken to the declaration.

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(a) See *Tench v. Swinyard*, 29 U. C. R. 319.

In *Hicks et ux. v. Ross*, 25 U. C. R. 50, the question of legitimacy was raised under the plea, which I suppose might have been done here. At all events the remarks already made about the first objection will apply to this.

The authorities referred to in *Roche v. Patrick*, in this Court (a), and the case of *Young v. Austen*, L. R. 4 C. P. 557, referred to in the argument, shew that, since the Common Law Procedure Act, pleadings are not construed by the strict rules which formerly prevailed.

*Judgment for plaintiff.*

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BETTIS V. WELLER ET AL.

*Promissory Note—Payable in U. S. Funds—Pleading.*

*Held*, that a note made in this province, payable in current funds of the United States of America, was not a promissory note.

The plaintiff having declared upon such note, the defendant pleaded setting it out *in hæc verba*, and alleging that it was made in this province: that the current funds mentioned were paper notes issued by the United States Government, and current there as money, but that the dollar named in them was not equal to the dollar of our money, nor of any fixed value; and that except by the indorsement of said notes by defendant, there was no contract between them and the plaintiff. *Held*, that the plea was good, and not objectionable as varying the written contract by parol.

DECLARATION.—For that one W. L. Weller, on the 1st of May, 1866, by his promissory note now overdue, promised to pay to the defendant W. H. Weller, or order, \$200 in current funds of the United States of America, one year after date, with interest at seven per cent per annum, and said defendant W. H. Weller indorsed the same to the defendant C. A. Weller, who indorsed the same to the plaintiff, and the said note was duly presented for payment and was dishonored, whereof the defendants respectively had due notice, but they did not nor did either of them pay the same. [Second and third counts, on similar notes for \$300 each,

payable respectively two and three years after date.] And the plaintiff avers that the said principal sums of said promissory notes, being eight hundred dollars in current funds of the United States of America, are equal to five hundred and eighty-two dollars of lawful money of Canada.

Plea.—That the said alleged note in the first count mentioned was and is in the words and figures following, and not otherwise, that is to say :

“ Cobourg, 1st May, 1866.

“ One year after date I promise to pay to the order of W. H. Weller, at the Bank of Toronto, in Cobourg, two hundred dollars, current funds of the United States of America, with interest at seven per cent. per annum.

“ W. L. WELLER.”

And the defendants further say, (setting out the other two notes in the same way). And the defendants further say that Cobourg in the said notes mentioned is the Town of Cobourg, in the County of Northumberland, in the Province of Ontario, and that current funds of the United States of America in the said notes mentioned were at the time of the making of the said notes, and still are, certain paper notes or debentures, issued by and in the name of the Government of the United States of America, which by the laws of the said United States passed and still pass current in the said United States as money, and which purport to be promises to pay certain sums, the unit whereof is denominated a dollar, but the dollar named in and represented by the said current funds is not equal in value to a dollar of lawful money of Canada, nor was it at the making of the said notes, nor has it since been, nor is it of any fixed or certain value, but was and is of variable and uncertain value. And the defendants further say that, except by the indorsement by them respectively of the said notes, there was not at any time any contract whatever between them or either of them and the plaintiff, with respect to the matters in the declaration mentioned.

Demurrer, on the grounds, 1. That the promissory notes mentioned are valid and unobjectionable. 2. That the words "current funds of the United States of America" are merely descriptive, and shew that the amount was payable at the rate of exchange between the United States of America and the Dominion of Canada, at the date of the maturity of the notes. 3. That the defendants admit that "current funds of the United States" pass current as money, and therefore the notes declared on are promises to pay a sum certain in money, and are therefore unobjectionable as notes. 4. That the notes as set out in the pleadings are payable generally, and not at any certain place only, and not otherwise or elsewhere. 5. That the plea sets up a parol qualification or variation of a written contract.

The case was argued in Michaelmas Term last.

*Crombie*, for the demurrer, cited *Yates v. Nash*, 8 C. B. N. S. 581; *Edis v. Bury*, 6 B. & C. 433; *Saunderson v. Piper*, 5 Bing N. C. 433; *Palmer v. Fahnestock*, 9 C. P. 172; *Chitty on Bills*, Ed. 1859, p. 86.

*C. S. Patterson*, contra, cited *Cushman v. Reid*, 5 P. R. 121; *Crawford v. Beard*, 13 C. P. 35; *Judson v. Griffin*, *Ib.* 350; *Sheriff v. Holcombe*, *Ib.* 590.

MORRISON, J.—The question raised on this demurrer is, whether the documents declared upon are promissory notes. In the case of *Gray v. Worden*, 29 U. C. R. 535, decided in this Court last term, after the fullest consideration, we were of opinion that an instrument drawn payable in Canada bills was not a promissory note, being restricted to redemption or payment in such bills. The notes in this case were made in this province, and their redemption restricted to current funds of the United States of America, which is equally if not more objectionable, and are therefore not promissory notes.

Mr. Crombie pressed that on the last ground of demurrer taken the plea was bad. The declaration on its face is bad,

and the defendant must be entitled to our judgment; but I see no good objection to the defendant setting out in his plea the instruments in *hæc verba*. In *Sprye v. Porter*, 7 E. & B. 58, where the demurrer was to a plea, Lord Campbell says, "There can be no doubt that the defendant is at liberty to allege that the written agreement declared upon was merely colourable, and to disclose, as a defence, the real nature of the transaction."

WILSON, J., concurred.

*Judgment for defendants.*

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#### KING v. KING.

*Comparison of writings—C. L. P. A., sec. 213.*

Action upon a note. Plea, *non fecit*. The Plaintiff put in a bond admitted to have been signed by defendant, and called no witnesses, contending that the jury might compare the two writings, and find their verdict thereon. *Galt, J.*, at the trial held that this could not be done, and nonsuited the Plaintiff.

*Per Morrison, J.*, the nonsuit was right. *Per Wilson, J.*, it was wrong.

THIS was an action brought by a son against his father, to recover the amount of a promissory note of \$500, alleged to be made by the defendant payable to the plaintiff. Plea, *non fecit*.

The case was tried before *Galt, J.*, at the last Fall Assizes, at Milton.

The plaintiff called three witnesses, whose testimony proved nothing relating to the note or the making of it. The note was then produced, and the plaintiff's counsel produced a bond to which was an admitted signature of the defendant. He then closed his case, contending that the comparison of the signature to the bond with the signature to the note might be made by the jury, and that if they were satisfied there was sufficient to prove the making of the note, and that they could give their verdict

on comparing the two documents, without any witnesses being called.

This was objected to by the defendant. The learned Judge was of opinion that a witness must be called as to the genuineness of the signature of the note sued upon, after which a comparison might be made by the jury, if the signature was disputed, and he nonsuited the plaintiff.

In Michaelmas term last, *Harrison*, Q. C., obtained a rule *nisi* for a new trial, for misdirection of the learned Judge in ruling that there was no evidence to submit to the jury in support of the declaration as against the plea of *non fecit*, and in refusing to submit to the jury for comparison the note sued upon with the defendant's bond, which at the trial was admitted and proved to the satisfaction of the Judge to be genuine, and in himself making the comparison and refusing to allow the jury to do so.

In Hilary Term last *J. B. Read* shewed cause. He referred to *Doe Perry v. Newton*, 5 A. & E. 515; *Birch v. Ridgway*, 1 F. & F. 270; *Cresswell v. Jackson*, 2 F. & F. 24.

*Harrison*, Q. C., supported the rule, citing *Tay*, Ev., 5th Ed., 1590; *Cobbett v. Kilminster*, 4 F. & F. 490; *Royal Canadian Bank v. Brown*, 27 U. C. R. 41, 45.

MORRISON, J.—This was an action on a note made by the defendant, to which he pleads *non fecit*. At the trial the plaintiff produces a paper with an admitted signature of the defendant signed to it, which with the disputed note he puts in, calls no witness whatever, either for the purpose of proving the handwriting to the note or to compare the note with the admitted signature, and closes his case, submitting that he has made out a case to go to the jury, and contending that it is for the jury to say, from the two papers, whether the handwriting to the note is that of the defendant, and that the Judge was bound, under the provisions of the 213th section of the Common Law Procedure Act, to say that there was evidence and a case to go to the jury, and to leave it to them to say whether the plaintiff was

entitled to recover ; and the question for our determination is, whether the learned Judge was so bound.

We were referred to several *Nisi Prius* decisions, in cases under the Common Law Procedure Act—*Cobbett v. Kilminster*, 4 F. & F. 490 ; *Cresswell v. Jackson*, 2 F. & F. 24 ; *Birch v. Ridgway*, 1 F. & F. 270—in support of such a mode of proof being allowed, but on examining these cases, in all of them witnesses were called. But even if a *Nisi Prius* authority had been found going the length contended for in this case, I would not feel myself bound by it, for I cannot think it ever was the intention of the Legislature to go so far, or that the 213th section of the Common Law Procedure Act in effect enables a party to make out a case for a jury as attempted at the trial here.

The 213th section enacts, that “ Comparison of a disputed writing with any writing proved to the satisfaction of the Judge to be genuine, shall be permitted to be made by witnesses ; and such writings, and the evidence of witnesses respecting the same may be submitted to the Court and jury, as evidence of the genuineness or otherwise of the writing in dispute.”

In my judgment the section clearly indicates, that where a writing is disputed either party may, after satisfying the Judge by proof, or, as in this case, by admission, that a writing produced is genuine, that in such case comparison of the two writings may be made by witnesses, and the evidence of such witnesses may be submitted to the jury. The genuineness of the writing is made a collateral fact for the Judge ; the writings and the testimony of the witnesses thereupon are evidence for the jury on the issue between the parties.

I doubt that it was the intention of the Legislature to dispense with the usual mode of proof of handwriting previous to the Common Law Procedure Act. I am inclined to think that the object was only to extend it by permitting, in cases of disputed writing, comparison with genuine writings not in evidence for any other purpose in a cause. To sanction a practice such as is contended for in this case

would, in my opinion, be very objectionable, obviously open to abuse, irrespective of the consideration that it might frequently happen that many jurors may not be competent to form an opinion merely by comparison.

I think the learned Judge was right in directing a nonsuit in this case, although I am not prepared to say that before evidence by comparison is given, that a witness should be called to swear to the genuineness of the disputed writing. I only decide that it is not sufficient to hand to the jury a genuine writing and the disputed one.

I have carefully read over the evidence of the witnesses examined by the plaintiff previous to putting in the note in question, and I find no testimony to go to the jury in support of the plaintiff's case.

I think the rule should be discharged.

WILSON, J.—The case of *Cobbett v. Kilminster*, 4 F. & F. 490, is a decision I am quite content to follow.

The argument of the reporter in his note to that case, is also satisfactory to my mind.

It is true the statute says the comparison shall be permitted to be made *by witnesses*, and that the writings *and the evidence of witnesses* respecting the name may be submitted to the Court and jury. But it is not said the comparison shall be made *only* by witnesses.

In *Taylor on Evidence*, 4th edition, 1562, it is said, "The comparison may be made by the jury themselves, or, in the event of there being no jury, by the Court." This has been repeated in the 5th edition, p. 1590.

By the former law it was permitted to the jury to compare a disputed writing with one proved and given in evidence in the cause, and relevant to the issue raised on the record: *Doe dem. Mudd v. Suckermore*, 5 A. & E., 703, 734.

I see no objection to the rule proposed; for either party, if not satisfied with the opinion of the Judge or jury, may call witnesses.

The suggestion, that where the jury makes the comparison the opinion formed or the result arrived at has not

the sanction of an oath, as it would have if witnesses were examined on the point, has not, I think, much force, even if it be correct.

The course pursued under the old rule was equally open to the same objection, but yet it was the law. And is it true that there is not the sanction of an oath in such a case? The jury examine the disputed writing with the genuine writing, which is evidence, and is in evidence, and they are required to say upon the evidence which the genuine writing affords, whether in their opinion the disputed writing is or is not a genuine writing also. All this they do under the solemnity of an oath.

The rule should, in my opinion, be made absolute to set aside the nonsuit.

RICHARDS, C. J., having been absent during the argument, gave no judgment.

The Court being thus equally divided, the rule dropped.

### ARCHIBALD v. HALDAN.

*Insolvent Act of 1869.—Notice of action to assignee—Mortgagee of goods rights of, under section 50.*

An Official Assignee in Insolvency sued for trespass in taking and selling goods, is not entitled to notice of action.

So held in accordance with the cases deciding that a Sheriff is not entitled to such notice; but *Wilson, J.*, but for these decisions would have thought otherwise.

The defendant pleaded (relying upon the 50th section of the Insolvent Act of 1869), that before the writ of attachment hereinafter mentioned, one C. mortgaged the goods to the plaintiff: that while said goods were in C's possession, the mortgage providing that he should retain them until default, the Sheriff seized the goods under an attachment in Insolvency issued at the suit of one M., and placed them in the custody of defendant, being an official assignee and guardian, and defendant being afterwards duly made assignee of C.'s estate, sold the goods—which are the alleged trespasses. *Held* a bad plea, for only negating a default by C. when the attachment issued, not when defendant received and sold the goods.

*Semble*, that the section referred to only restrains a suit by creditors who have proved, or can prove, on the estate, and does not prevent a mortgagee from suing in trespass for a wrongful taking of the goods.

DECLARATION. Trespass for taking goods, and trover.

Third Plea.—That the supposed trespasses were committed after the passing of an Act known as “The Insolvent Act of 1869,” and were committed by the defendant as guardian and assignee under and by virtue of the said statute, and no notice in writing was delivered to the defendant, or left at his usual place of abode by the plaintiff, his attorney or agent, of the commencing this action, one month before the same was commenced, pursuant to the statutes in that behalf.

Fourth Plea.—That before the issue of the Writ of Attachment hereinafter mentioned, one James Campbell, to wit, on or about the twelfth day of August last, made a conveyance by way of mortgage to the said plaintiff of the goods and chattels in the declaration mentioned, the said James Campbell then and from thenceforth, until the attachment thereof hereinafter mentioned, being in possession of the same, as security for the repayment to the plaintiff of a certain sum of money, with interest, at a time therein mentioned : that subsequent to the execution of the said conveyance, and to the passing of a certain Act known as “The Insolvent Act of 1869,” and after the same came in force, and before the time for repayment of the said moneys had expired, and while the said James Campbell was a trader within the meaning of the said Act, and while the said goods and chattels were in his possession, the said chattel mortgage providing that the same should so remain until default in payment of the moneys aforesaid, a certain writ of attachment in insolvency duly issued out of the County Court of the County of Huron, within which county the said J. C. did then reside, in the form and according to the provisions of the said Act, at the suit of one A. M., directed to the Sheriff of the said County of Huron, who, under and by virtue of the said writ, and in pursuance of the said statute, did, by his agent, duly seize and attach the said goods and chattels, the same not being exempt from such seizure ; and the defendant then and still being an official assignee in and for the said County of Huron, the said Sheriff did place the said goods and chattels in his

custody as guardian under the said statute, and that the same so continued until such proceedings were had and taken as constituted the said defendant assignee of the estate of the said James Campbell, when he advertised and made sale, according to the said statute in that behalf, of the said goods and chattels in the declaration mentioned, as he lawfully might for the causes aforesaid—which are the alleged trespasses.

Demurrer. That the said plea does not deny that the goods mentioned in the first and second counts were the plaintiff's.

That it is not shewn by said plea that the plaintiff had not the possession and right to possession of the said goods at the time the Sheriff seized said goods, or at the time he placed them in the custody of defendant, or at the time the defendant sold them as in said plea mentioned.

That it is not shewn by said plea that at any of the times aforesaid the said J. C. in said plea mentioned, or the defendant as guardian or assignee, had any right or interest in said goods, or any right to possession thereof as against the plaintiff, or that said goods, or any of them, at any of the times aforesaid, were the goods or property of the said J. C. or the defendant as against the plaintiff.

*S. Richards*, Q.C., for the demurrer. The defendant is not a public officer within the meaning of Consol. Stat. U. C. ch. 126. The Sheriff has been held not to be "an officer or person fulfilling any public duty," and not to be doing anything "in the performance of such public duty," when he is acting in a private civil suit between parties as the officer of the Court: *McWhirter v. Corbett*, 4 C. P. 203; see also *Davis v. Williams*, 13 C. P. 365; and the assignee in insolvency cannot be a public officer when the Sheriff is not. The 50th section of the Insolvent Act of 1869 does not prevent a suit being brought at law against the assignee, though it affords an additional remedy in favour of one having a cause of complaint against him. The fourth plea does not shew that the plaintiff,

at the time of the commencement of this suit, or at the time of the delivery of the goods by the Sheriff to the defendant, or at the time of the sale of them by the defendant, had not the immediate right to possession and property in the goods. It merely shews that at the time the writ of attachment issued the money was not due or payable by Campbell to the plaintiff, and that Campbell down to and at that time was still lawfully, by the terms of the mortgage, in possession of the goods.

*Robinson, Q.C., contra.* A pathmaster has been held to be a public officer, and entitled to notice of action: *Helliwell v. Taylor*, 16 U. C. R. 279; so also a pound-keeper: *Davis v. Williams*, 13 C. P. 365. Official assignees are appointed by the Boards of Trade or by the County Judge if there is no Board of Trade and are required to give security: Insolvent Act of 1869, sec. 31; and they are compelled to receive the property seized by the Sheriff from him: sec. 25. They are therefore different from the nominees of the debtor. The 50th section of the Act may be an extraordinary one, but it is very explicit, and in the face of it this action cannot be maintained. It declares that "every interim assignee, guardian and assignee, shall be subject to the summary jurisdiction of the Court or Judge in the same manner and to the same extent as the ordinary officers of the Court are subject to its jurisdiction, and the performance of their respective duties may be compelled, and all remedies sought or demanded for enforcing any claim for a debt, privilege, mortgage, hypothec, lien or right of property upon, in, or to any effects or property in the hands, possession or custody of the assignee, may be obtained by an order of the Judge on summary petition in vacation, or of the Court on a rule in term, and not by any suit, attachment, opposition, seizure or other proceeding of any kind whatever; and obedience by the assignee to such order may be enforced by such Judge or Court under the penalty of imprisonment as for contempt of Court or disobedience thereto, or he may be dismissed, in the discretion of the

Court or Judge." The plaintiff here is attempting by suit to enforce his rights as mortgagee, which the Statute prohibits, and except under the mortgage he has no claim: *The Queen v. Master*, L. R. 4 Q. B. 285; *Crisp v. Bunbury*, 8 Bing. 394. It sufficiently appears that Campbell was the owner of the goods which he mortgaged, for it is said he was in possession of them by the terms of the mortgage.

WILSON, J., delivered the judgment of the Court.

If a Sheriff is a person not fulfilling a public duty when he is acting between parties under civil process, and it has so been decided in two cases, a guardian or assignee cannot, we think, be considered to be any more a public officer than a Sheriff is.

The Sheriff executes the attachment against insolvent estates, and he delivers the property seized to the guardian or assignee.

If the Sheriff is not to be regarded as performing a public duty in executing ordinary civil process, he cannot be regarded as performing a public duty when he is executing an insolvent attachment. And it would be unreasonable, while holding the Sheriff in the last case not to be discharging a public duty when he seizes and hands over the insolvent estate, to hold that the guardian or assignee to whom the same was delivered was a public officer, and was performing a public duty. The assignee cannot claim any greater protection or privilege than the Sheriff can.

We are therefore of opinion, on the authority of the cases referred to, that the defendant was not entitled to notice of action.

There must be judgment for the plaintiff on the demurrer to the third plea.

I may add that in *Henly v. The Mayor of Lyme*, 5 Bing. 91, 107, Best, C. J., said: "Then, what constitutes a public officer? In my opinion, every one who is appointed to discharge a public duty, and receives a compensation in whatever shape, whether from the Crown

or otherwise, is constituted a public officer. Bishops, certainly, are paid by the Crown, not in money, but by estates which have been granted to them; and in consequence of the grant of such estates certain duties have been imposed on the bishops; such, for instance, as holding Ecclesiastical Courts. Does any man doubt, if a bishop, by neglect to hold an Ecclesiastical Court, prevents an individual from obtaining probate of a will, by which he sustains an injury, an action might be maintained against such bishop for the consequence of that neglect? Clergymen are public servants. \* \* \* And it has been decided, that if a clergyman refuse to administer the sacrament to a man who is thereby prejudiced in his civil rights, an action is maintainable against the clergyman. So if a clergyman were to neglect to register a person brought to be baptized, and in consequence of that such person should lose an estate, does any man doubt an action could be maintained against him? If the Bank of England refuse to transfer stock, an action may be maintained against them. \* \* \* It seems to me that all these cases establish the principle, that if a man takes a reward—whatever be the nature of that reward, whether it be in money from the Crown, whether it be in land from the Crown, whether it be in lands or money from an individual—for the discharge of a public duty, that instant he becomes a public officer; and if by any act of negligence, or any act of abuse in his office, any individual sustains an injury, that individual is entitled to redress in a civil action."

If the Sheriff were to punish or confine a prisoner in custody on civil process in a reasonable manner, to enforce due obedience and good behaviour, and an action were brought against him by the prisoner for the punishment imposed, could it be said the Sheriff was not performing a public duty, or acting as a public officer? If it could not, it is difficult to see how he is less performing a public duty when he arrests the same prisoner, or takes his goods on civil process.

The cases of *Yorke v. Chapman*, 10 A. & E. 207; *Rex v.*

*Huggins*, 17 St. Tr. 29; and *Rex v. Bambridge*, 17 St. Tr. 383, shew what the duty of Sheriffs and gaolers is as to prisoners. Actions for extortion and other matters shew what the duties of Sheriffs are in other cases.

But for the decisions in our own Court, I should have thought a Sheriff was quite as much a public officer as a pathmaster, and that the guardian or official assignee in insolvency was one also.

As to the fourth plea: It does not shew that Campbell had not made default when the Sheriff delivered the goods to the defendant, or when the defendant sold them. It does shew that before these times, that is, at the time of the issuing of the writ of attachment, no default had been made by Campbell. But though that may have been the case, it does not follow that a default was not made at the time when the defendant received the goods or sold them. The plaintiff therefore may have had, for anything which the plea shews to the contrary, the full legal property and right of possession to the goods at the commencement of this action.

The plaintiff is therefore entitled to judgment on the demurrer to the fourth plea.

The parties have argued, however, against the declaration; or, what is equivalent to it, that the plaintiff is not entitled at law to maintain his action. We shall dispose of it, as it strikes at the root of the action, although no notice of the exception was given; and it is probable it had not presented itself to the parties until after the cause was set down for hearing.

The words "all remedies sought or demanded for enforcing any claim for a debt, privilege, mortgage, hypothec, lien or right of property, upon, in or to any effects or property in the hands, possession, or custody of the assignee, may be obtained by an order of the Judge on summary petition, and not by any suit," appear to me to apply to proceedings between creditors, parties to the insolvency proceeding, or who have it in their power to become parties thereto. In that respect it is like the private forum, established by

arbitration between the Trustees of the Savings Bank and its depositors: *Crisp v. Bunbury*, 8 Bing. 394, referred to in the argument.

The statute cannot prevent (unless by the very plainest words, which I think have not been used) a person who is not a creditor at all, and whose property, lands, goods, money, and other effects, have been wrongfully taken as the property of the debtor, from pressing his redress in the ordinary Courts of law. Creditors who have proved are certainly within the operation of the enactment. But I think, further, that all persons who can prove on the estate, although they have not made themselves parties to the insolvency, are within it also.

Before that provision a creditor who had a mortgage with a power of sale, could enforce his remedy without regard to the insolvent law, as he was not obliged to rank on the estate unless he chose: *Gordon v. Ross*, 11 Grant 124. The effect of this section would seem to be to prevent this being done, and to compel the party to appear before the domestic tribunal of the Judge, and to enforce his rights by way of summary petition, "and not by any suit, attachment, opposition, seizure, or other proceeding of any kind whatever."

But that cannot exempt the assignee from responsibility for an illegal act. He has no right to take the goods mortgaged to the plaintiff, who was entitled to the immediate possession of them, and to sell them (for anything that the plea shews) without authority of any kind from the creditors or the Judge, and against the plaintiff's consent, and before any meeting of the creditors had ever been called.

The plaintiff is not now proceeding for any debt, privilege, mortgage, hypothec, lien, or right of property, upon, in, or to any effects or property in the hands, possession or custody of the assignee; but for a trespass in taking away and selling goods to which he had the right of possession and property, without authority for so doing.

The assignee had an interest in the goods subject to the

plaintiff's prior claim, but the creditor had the right to the goods themselves until his claim was properly adjudicated upon. See sec. 60.

The plaintiff's right to the goods being complete after default had happened on the mortgage, and that default having happened, as it is before stated it must be assumed in the pleadings against the defendant to have happened, before the commencement of the suit, his remedy for the wrong complained of was, for anything shewn by the plea, by suit at law in the ordinary way against the defendant.

There will therefore be judgment for the plaintiff on the demurrer to both pleas.

*Judgment for plaintiff.*

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HENNESSY V. HENNESSY.

Declaration that the defendant, by deed, covenanted (not saying *with the plaintiff*) to pay to the plaintiff, &c. *Held*, good on demurrer.

DECLARATION, that the defendant, by deed dated the 5th November, 1868, covenanted to pay to the plaintiff the sum of \$200, &c.

*Demurrer*, that it does not appear that the defendant covenanted with the plaintiff to pay the plaintiff the moneys mentioned in the said count.

*Holmested*, for the demurrer, cited *Offly v. Warde*, 1 Lev. 235; *Barford v. Stuckey*, 5 Moore 23; *Berkeley v. Hardy*, 5 B. & C. 355.

*O'Connor*, contra, referred to *Stephen* on Pleading, 294, ed. of 1866.

WILSON, J., delivered the judgment of the Court.

It is necessary, in the common count for goods sold and delivered, that it should appear the goods had been sold

and delivered "by the plaintiff to the defendant:" see Schedule to C. L. P. Act; *Perks v. Severn*, 7 East 194.

A statement that defendant is indebted to the plaintiff for goods sold and delivered to defendant, not stating *by plaintiff*, is objectionable, for it is said it may have been that the goods were sold by another and the debt assigned to the plaintiff: *Cathrow v. Hagger*, 8 East 106; *Taylor v. Forbes*, 11 East 315; *Trenton v. Ellis*, 6 Taunt. 192; and when it is omitted to state that the goods were sold and delivered *to the defendant*, it is said that it might have been a sale to another for whose debt the defendant had made himself responsible: *Eyre v. Hutton*, 5 Taunt 704.

These objections, I think, would be cured after verdict, or by pleading over: *Wilkinson v. Sharland*, 10 Ex. 724; S. C. 11 Ex. 33.

The case of *Price v. Easton*, 4 B. & Ad. 433, does not apply, because the arrangement there set out, and on which the plaintiff's claim was founded, was stated to have been made by the defendant, a third person, and it was consistent with all the matter alleged that the plaintiff was entirely ignorant of the arrangement, and there was no consideration for the promise moving from the plaintiff to the defendant.

In *Marshall v. Birkenshaw*, 1 N. R. 172, it appeared that the plaintiff, at the request of two persons, had sold them goods; and it was alleged that, in consideration thereof, and that the plaintiff, at defendant's request, would forbear and give day of payment (not stating *to whom*) he, defendant, promised the plaintiff to pay him the sum due by the two persons; and the Court held that the forbearance must, by intendment, have been to the two persons, but that the objection was cured by verdict.

This last case would have been similarly decided on a general demurrer.

Then the form of declaration by payee against maker on a promissory note, as given in the Schedule of the C. L. P. Act, is also material to be considered. The form

is, "that the defendant on," &c., "by his promissory note, now overdue, promised to pay to the plaintiff," &c., which is very like the form in this action, "that the defendant, by deed dated, &c., covenanted to pay to the plaintiff," &c.

Neither form states the promise or covenant to have been made to or with the plaintiff. In the old mode of declaring on promissory notes that would have been deemed defective, but as the rule was always to allege the *delivery* of the note by the maker to the payee, it was not considered necessary to allege more, in addition to the delivery, than that the maker promised to pay the payee, according to the tenor and effect of the note, without stating that he promised the payee to pay the payee, for, "By the tenor of the note, coupled with the delivery, his promise was to the plaintiff. The utmost ingenuity cannot discover a third person to supplant him : " *Banks v. Camp*, 9 Bing. 604.

Here there is room to conjecture that the defendant might have covenanted *with some third person* to pay the plaintiff the money in question. But so it is with respect to the statutable form by payee against maker on a promissory note. And as the Statute has sanctioned such a form of declaring on promissory notes, it is not a violation of the principles of pleading to apply the same rule to an action on a deed.

No injustice can be done to the defendant by holding this form of count sufficient, for the plaintiff must, on a denial of the making of the deed, prove it to have been made with himself; otherwise he will fail.

It certainly would have been better if the count had alleged the deed to have been made with the plaintiff, or to have amended it, which could have been done on payment of a nominal sum, for it would have saved the necessity of determining such a question.

The cases referred to by the defendant have not assisted us in any way.

*Judgment for plaintiff.*

## REGINA V. PLUMMER.

*Velocipede—Use of on sidewalk—"Obstruction."*

The use of a velocipede on a sidewalk, though no one be near it, may be an obstruction, within the provision of a by-law that no person shall by any vehicle encumber or obstruct the sidewalk.

*Moss*, in Michaelmas Term last, obtained a rule calling on the Police Magistrate of London and Patrick Wallace to shew cause why the conviction of the said Plummer by the Police Magistrate, on or about the 7th of April, 1869, on the information of Wallace, should not be quashed, with costs, on the ground that the Magistrate had no jurisdiction to make the conviction, and that the same is in excess of his jurisdiction, and that there was no evidence before him to support the conviction, and that no offence was proved against the section of the by-law referred to in the conviction.

The conviction alleged that the applicant encumbered and obstructed a sidewalk of one of the streets of London with a vehicle called a velocipede, contrary to the 36th section of the City of London by-law, passed on the 9th of July, 1866.

The section of the by-law provided, "That no person shall, by any animal, vehicle, lumber, building, fence, or other material, goods, wares, merchandize, or chattels, in any way encumber, obstruct, injure, or foul any street, square, lane, walk, sidewalk, road, bridge, or sewer now being or hereafter to be laid out and erected, (except as hereinafter provided with respect to buildings)."

In the same term, no cause being shewn, *Osler* moved the rule absolute. The conviction cannot be maintained. Using a velocipede on the sidewalk was not *obstructing* the sidewalk, and the evidence shews that no one was in the street about where the velocipede was, and that it did not take up more room than a single person. 'Obstruction' means something of a permanent nature, or of a more permanent nature than the mere passing along the sidewalk

with such an article. Russell C. & M., 4th ed., 485; *Regina v. Mathias*, 2 F. & F. 570.

WILSON, J.—A velocipede, I should say, may be an obstruction or encumbrance on a sidewalk. All that has to be done is to give the words a reasonable latitude in interpretation, just as we have to do when we use them. Now, to ordinary comprehension, a horse, or a waggon, or a drove of sheep or oxen, driven along the sidewalk, would be understood to be an obstruction or encumbrance to the legitimate use of it by those desirous of using it.

I understand this language off the Bench, though not the most exact or scientific, and I do not know why I should not understand it as sufficiently precise for the purpose on the Bench; and I understand it to mean, that whoever, by any of the means described in the by-law, prevents foot travellers from the free, safe, and convenient use of the side-walk, offends against the enactment.

It is true that both *encumber* and *obstruct* are terms that are generally applied to more permanent acts, but the greater or lesser degree of permanency, or continuance, or durability, can make no absolute difference in the nature of the act, nor can it make any difference that these terms are commonly applied to fixed articles; they may equally apply to an animal or to a person, or to an inanimate thing in motion.

A person may be obstructed in the performance of his duty, and I think that threats may constitute an obstruction.

The Dominion Act 32-33 Vic. ch. 28, enacts that "all persons loitering in the streets or highways, and *obstructing* passengers by standing across the footpaths, or *by using insulting language*, or in any other way," shall be deemed vagrants. That is a very plain exposition of what may be an obstruction.

The evidence cannot by way of review properly be looked at, but even if read I am not prepared to say that the use of the velocipede, while no one is in the street, is

not an encumbering or obstructing of it. If it were not, it must follow that in the night time every kind of nuisance and impediment could be laid on the sidewalk without hindrance, and kept there so long as it was moved by daylight.

I think the rule must be discharged with costs.

MORRISON, J.—concurred.

*Rule discharged.*

### BARKER V. TORRANCE ET AL.

*Shipment of wheat—Delay in unloading—Liability of consignor—Evidence.*

A cargo of wheat was shipped at Chicago by R. & T., "as agents and forwarders, for account and at the risk of whom it may concern," consigned in the margin "Order Bank of Montreal, for Messrs. Torrance & Co. (the defendants), care of Glassford, Jones & Co., Kingston." On arriving at Kingston the vessel was detained by G. J. & Co., as the jury found, an unreasonable time in unloading. Defendants, Messrs. T. & Co., paid the freight, enclosing it in a letter to G. J. & Co., in which they spoke of the grain as theirs.

*Held*, that there was evidence to shew that T. & Co. were both consignors and consignees, and that in the former capacity, though not in the latter, they were liable for the delay, as upon an implied contract to receive the wheat within a reasonable time.

THE declaration contained two counts.

1. That defendants did not receive a cargo of wheat loaded on board the plaintiff's vessel, on her arrival at Kingston from Chicago, within a reasonable time after the arrival of the vessel at Kingston, according to defendants' promise.

2. For not unloading on arrival of the vessel.

Pleas. 1. That defendants did not promise as alleged; 2. To first count, that defendants did cause the wheat to be received within a reasonable time after notice that the plaintiff was ready to deliver the same; 3. To second count, that defendants did not neglect to unload the vessel on her arrival at Kingston. Issue.

The cause was tried at the last Spring Assizes at Kingston, before Galt, J., when a verdict was rendered for the

plaintiff for \$400, with leave to defendants to move to enter a nonsuit, as it had not been proved that defendants were consignors, the learned Judge being of opinion there was evidence to support the second and third issues.

The evidence was to the following effect :

*Alfred Edie*, the master of the vessel, said he received a cargo of grain on the vessel, shipped by Ranney & Inglis for Torrance & Co., of Montreal, with a shipping note signed by Ranney. Glassford & Jones were agents in Kingston. The note was as follows :

" CHICAGO, September 3rd, 1869.

" Shipped in good order and condition, by Ranney & Inglis, as agents and forwarders, for account and at the risk of whom it may concern, as consigned in the margin, subject to freight and charges as below.

" 19,814 $\frac{30}{80}$  bushels No. 2 Spring Wheat, &c.

" RANNEY & INGLIS."

In the margin :

" Order Bank of Montreal, for Messrs. D. Torrance & Co., care of Glassford, Jones & Co., Kingston, Canada."

And on the original was written :

" Deliver to the order of D. Torrance & Co.

" (Signed) J. J. TATE,  
" Manager, Bank of Montreal."

Across the shipping note was written :

" Received the within mentioned cargo. and paid freight and charges.

" GLASSFORD, JONES & CO.

" per J. D. THOMPSON."

" Kingston, September 22, 1869."

He proved that he left Chicago on the 3rd September, arrived at Kingston on the 16th, Thursday, and was alongside of the dock of Glassford, Jones & Co. at 7 A.M. : that Mr. Thompson, one of the clerks, told him he would unload him when his turn came, and promised to have him unloaded on Saturday : that nothing was done till Tuesday, the 21st, when they took out 5,000 bushels at the floating elevator : that the next afternoon they began again, and finished on Thursday morning at six o'clock. Mr. Thompson, he said, consented to the vessel going to any other elevator, but no other could receive it ; there were three elevators. He served no written notice on Glassford, Jones & Co.

He was at all times ready, he said, to deliver the cargo, but they could not or would not receive it. "I never," he said, "discharged a cargo at Kingston without an elevator. An elevator would discharge the cargo in twelve hours. It is unusual to unload except by elevators. The custom is to unload in turn, and if we are not detained from any other cause than other vessels having precedence of us, we consider that after forty-eight hours delay we are out of turn, and ought to receive compensation. The detention in this case arose from want of barges to receive the grain. The elevator was not kept going all the time. I had sufficient men at all times to enable me to handle the vessel. If the elevator had been kept going I would have been unloaded by Saturday night (18th)." On cross-examination he said: "There were vessels ahead of me when I arrived at Kingston. Mr. Thompson told me if I could get discharged elsewhere he was willing. I could not. Have been detained as much as 48 hours: consider 48 hours a fair time for detention."

James D. Thompson said: "I was a clerk in the employ of Glassford, Jones, & Co.; they were agents for receiving grain for D. Torrance & Co. The reason the vessel was not unloaded before was because we had no barges at Kingston of capacity to receive the cargo of the *Hoboken*, plaintiff's vessel. I paid the freight. Mr. Torrance sent me a draft for the purpose; it was enclosed in the letter now produced:

"MONTREAL, 23rd September, 1869.

"Messrs. GLASSFORD, JONES, & Co., Kingston.

*Dear Sirs*:—We received yours of the 22nd inst., and are glad the damage by the "*Jessie*" was so small, and that you were able to put it on the vessel. We shall be glad to know when you propose shipping our grain, and what vessels are at Kingston. We now enclose bank cheque for \$1,931.91 and \$1,800 for freights per "*Hoboken*" and "*Pandora*," as per your telegram this morning:

"*Hoboken* 19,814.30 bushels, at 9¾c., \$1,931.91.

"*Pandora*, 18,000 bushels, at 10c., \$1,800.00.

"We are, dear Sirs, your obedient servants,

"DAVID TORRANCE & CO."

"I think that Ranney & Inglis were agents of Torrance & Co. in this transaction. I judge from the bill of lading: I know nothing more."

The learned Judge directed the jury that the question they had to consider was, whether the defendants were guilty of unreasonable delay in receiving the wheat, and in determining that they should consider what the course of trade was at Kingston, and what facilities there existed for unloading.

The jury found for the plaintiff, as before stated.

*Anderson* obtained a rule calling on the plaintiff to shew cause why a nonsuit should not be entered, pursuant to leave reserved, on the ground that there was no evidence to establish any liability of defendants for demurrage, because there was no evidence that defendants were consignors; or why there should not be a new trial, because the verdict was against law and evidence, there being no evidence of such delay as would render them liable.

*Britton* shewed cause. The bill of lading shews the shipment at Chicago was for defendants; they were, therefore, the real consignors: *McAndrew v. Bell*, 1 Esp. 373; *Drachachi v. The Anglo-Egyptian Navigation Co.*, L. R. 3 C. P. 190; *Kyle v. Buffalo and Lake Huron R. W. Co.*, 16 C. P. 76; *Kemp v. McDougall*, 23 U. C. R. 380. Defendants, in their letter put in, speak of the grain as theirs, and it was not shewn that any other person than defendants owned the grain: *Arnould* on Insurance, 1314; *Leake* on Contracts, 613. Defendants accepted the grain, and unloaded it by their agents at Kingston; they are therefore liable also as consignees: *Moeller v. Young*, 24 L. J. Q. B. 217; S. C. 5 E. & B. 775.

*Anderson* supported the rule. The questions are, was there any breach of contract proved; and, if so, are the defendants liable. The implied contract here is different from the condition in a bill of lading to unload: *Smith v. Sieveking*, 4 E. & B. 945; S. C. in Ex. Ch. 5 E. & B. 589. The bill of lading does not shew defendants to be consignors. The shippers are *prima facie* the consignors when they ship for whom it may concern. If defendants were consignees they might speak of the grain

as theirs, as they did. The contract to unload must of course be with reference to the place of unloading: *Maclachlan on Shipping*, 445-6.

The delay was in consequence of pressure at the three different elevators, and unloading by elevator was the usual and quickest mode. The barges that were wanting, which was the real cause of delay, should have been found by the owners of the elevator, and not by the consignor or consignee, nor by any one that either consignor or consignee was liable for.

WILSON, J., delivered the judgment of the Court.

In *Jesson v. Solly*, 4 Taunt. 52, it was decided that if the consignee accept goods under a bill of lading which provided that the ship was to be cleared in sixteen days, and that £8 per day for demurrage was to be paid after that time, he is liable, because he adopts the contract contained in the bill of lading: *Wegener v. Smith*, 15 C. B. 285. This last case shews also that the master may sue for the demurrage as well as for the freight, if the bill of lading under which the consignee takes the goods charges them with the demurrage as well as the freight.

It is only for delay accruing from the consignee's own delay at the port of delivery that he is liable, and not for delay of the shipper or consignor at the port of loading: *Smith v. Sieveking*, 5 E. & B. 589.

In *Young v. Moeller*, 5 E. & B. 755, in the Exchequer Chamber, the Court held that there was no implied contract on the part of the consignee or his assignee to receive the goods within a reasonable time, though the endorsee of the bill of lading on receiving the goods under it is bound by its terms.

No case can be raised therefore by the plaintiff as owner of the ship against the defendants as assignees.

In *Kemp v. McDougall*, 23 U. C. R. 380, it was held that the consignor was liable on such an implied contract, referring to the language of Lord Ellenborough in *Randall v. Lynch*, 2 Camp. 352, where, owing to the crowded state

of the London docks, the ship was detained more than fifty days in unloading: "that the person who hires a vessel detains her, if at the end of the stipulated time he does not restore her to the owner." *Chappel v. Comfort*, 10 C. B. N. S. 802, is also an authority to the same effect.

There was evidence of the defendants being both consignors and consignees, or assignees of the consignees. The contract can therefore be implied which is declared on.

The evidence then shews that the defendants detained the vessel beyond a proper time, according to the cases last mentioned.

The defendants' own wheat constituted the entire cargo of the vessel. They were substantially the charterers, and no difficulty arises as there might have been if the ship had been a general ship.

The rule will be discharged.

*Rule discharged.*

## EKINS V. THE CORPORATION OF THE COUNTY OF BRUCE.

*Contract—Certificate of engineer—Separation of counties.*

The plaintiff entered into a contract under seal with the United Counties of Huron and Bruce, to construct a gravel road in Bruce according to plans and specifications annexed, payments to be made monthly on the estimate of the engineer in charge, who was to determine the amount or quality of work to be paid for under the contract, and to decide all disputes relating to the execution of the contract, and his decision was to be final.

The counties were separated on the 1st January, 1867, and the plaintiff afterwards sued the County of Bruce alone for work done in making the road. *Held*, 1. That he could not recover without a certificate of the engineer; and, 2. That the action should have been against the United Counties.

Action on common counts.

Pleas, never indebted, payment, and set-off.

The cause was tried at the last winter assizes at Toronto, before Galt, J., when the plaintiff was nonsuited.

There was an agreement under seal, made on the 27th of January, 1866, between the plaintiff of the first part, the

Corporation of the United Counties of Huron and Bruce of the second part, and Stephens & Rankin, sureties for the plaintiff, of the third part, for the construction and finishing by the plaintiff of a gravel road on or before the 15th of October, 1866, lying in the County of Bruce.

The separation of Bruce from the union took place on the 1st January, 1867.

The evidence shewed that the contract contained the usual clauses : that the plaintiffs were to be paid monthly on the estimate of the engineer of the united counties in charge of the works : that the specifications and schedules annexed were to be considered part of the agreement : that the engineer should in all cases determine the amount or quality of the several kinds of work to be paid for under the contract, and the amount of compensation at contract prices to be paid therefor ; and that he should in every case decide every question which could or might arise relating to the execution of the contract, and that his decision should be final and conclusive.

It was contended that the work claimed for was not done under the agreement, but was extra work performed for the County of Bruce after its erection into a separate county at the special request and direction of the officers of the county.

The items charged for were :—

Extra filling at Hill.....	\$150
Work at Cross-way ....	103
Grubbing .....	225

and for which it was contended defendants were clearly liable without any certificate of the engineer, if not for the other items.

It was objected that the work done was within the contract, and could not be recovered for without calling the engineer or producing his certificates, and that the action should have been against the united counties, with whom the contract was made ; and upon these objections a nonsuit was directed.

In Hilary Term last, *Harrison*, Q. C., obtained a rule calling on defendants to shew cause why the nonsuit should not be set aside.

In this term *Robinson*, Q. C., shewed cause. The decision of the engineer was final, and he has decided everything according to the agreement. The plaintiff can claim nothing more than he certifies for and allows. Moreover, he has in fact allowed the plaintiff according to the measurement of his own engineer, who measured along with the county engineer, and their measurements agreed : *Roberts v. The Bury Improvement Commissioners*, L. R. 4 C. P. 755 : reversed in Exch. Ch., L. R. 5 C. P. 310 ; *Grafton v. The Eastern Counties R. W. Co.*, 8 Ex. 703 ; *Russell v. DaBandeira*, 13 C. B. N. S. 149 ; *Milner v. Field*, 5 Ex. 829 ; *Coatsworth v. City of Toronto*, 7 C. P. 490 ; *Bullen and Leake's Prec.*, 3rd ed., 270, 464.

The action also should have been against the united counties : *Campbell v. The Corporation of York and Peel*, 26 U. C. R. 635, 27 U. C. R. 138. No plea in abatement was necessary, for this action is against a different corporation.

*Harrison*, Q. C., in support of the rule, argued that the work was not within the contract, but was done for the County of Bruce alone after the separation. He referred to *Reid v. Batte*, M. & Malk. 413 ; *Thornton v. Place*, 1 M. & Rob. 219.

WILSON, J., delivered the judgment of the Court.

The evidence shews the work claimed for was such work as was to have been performed under the agreement, and all such work the defendants' engineer was to determine the amount or quality of, and the compensation to be paid for it, and his decision was to be final and conclusive, and payment was to be made only on his certificate ; and he either has done all this, in which case the plaintiff has been paid, or he has not done it, in which case the plaintiff by the terms of the contract is not entitled to recover.

The objection to suing the County of Bruce alone should

also be decided in favour of defendants. The work done under it, however long it may continue, must be binding on both counties as jointly liable. There is no provision to meet such a case, unless the 61st section of the Consol. Stat. U. C. ch. 54, re-enacted by the Act of 1866, 29-30 Vic. ch. 51, sec. 61, and it is apparently within the language of the section.

It is of little consequence which way it is, so long as it is plainly settled one way or the other, and it has been by the decisions referred to, and we think also by the section in question.

We think the rule should be discharged.

*Rule discharged.*

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### STEVENS V. PENNOCK AND ARMSTRONG.

#### *Trover—Evidence of Conversion.*

Defendant P. having a chattel mortgage, which did not cover the piano in question, authorized A., as his bailiff, to sell the goods mortgaged, and A. was also authorized by the landlord of the mortgagor to distrain for arrears of rent. Under the distress warrant A. seized and advertised the piano, but was directed by the landlord not to sell it. He applied to P. as to the sale of the piano, who referred him to his attorney, and he afterwards sold it, and paid the proceeds to P., who had knowledge of all the facts, and who he said had indemnified him. *Held*, that P. was liable with A. in trover for the piano.

TROVER for a piano.

Pleas, by defendants separately, not guilty, and not possessed.

The cause was tried at the assizes held last spring at Ottawa, before Galt, J.

The facts were, that Pennock had a chattel mortgage from Louisa Halfpenny, the sister of the plaintiff, and with whom the plaintiff lived, which did not include the piano in question.

Defendant Armstrong was empowered by Pennock to sell the goods included in the mortgage; and he was also empowered by the landlord of Mrs. Halfpenny to distrain on the goods and chattels on her premises for arrears of rent.

Under that warrant from the landlord Armstrong seized the piano, and advertised it with other goods for sale.

Before the sale the landlord directed Armstrong not to sell the piano, as there were goods enough of Mrs. Halfpenny's to satisfy his rent without the piano. Armstrong, however, went on and sold the piano, and paid the price of it, with other goods, to Pennock.

Armstrong therefore was liable; the question was whether there was any evidence charging Pennock with liability for Armstrong's act.

The plaintiff said: "Armstrong said he had seized the piano as Mrs. Halfpenny's, for a debt due to Pennock."

Wm. H. Falls said: "I called on the landlord about the piano being put in the advertisement for sale. He referred me to Pennock. I went to him. He referred me to his legal adviser, Mr. Walker, and said that he himself knew nothing about it, and that if Mr. Walker consented to withdraw the piano, he had no objections. I went to Mr. Walker. (What took place with him did not appear.) William Pennock, defendant Pennock's brother, was at the sale, and directed it to go on, and the piano was sold. Armstrong said that defendant Pennock had indemnified him. Pennock was present at the sale. I served notice on Armstrong for the plaintiff not to sell. He told me he would account to Mr. Pennock, and Mr. Pennock would give it to me."

Armstrong said: "I paid the proceeds of the sale to Mr. Pennock's lawyer by the landlord's order. I told Pennock the proceeds included the piano, and that the landlord had told me not to sell the piano. I told him this before I paid the money to his lawyer. I was instructed to seize under the chattel mortgage."

On the evidence on this point the learned Judge directed the jury, that if they were satisfied that Pennock, before he received the proceeds of the sale, was informed that the landlord had forbidden the piano to be sold, and that the proceeds of sale included the price of the piano, he was liable as well as Armstrong.

The Counsel for Pennock objected to this charge.  
The jury found for the plaintiff, and \$130 damages.

*S. Richards*, Q. C., obtained a rule, calling on the plaintiff and the defendant Armstrong to shew cause why the verdict against Pennock should not be set aside, as contrary to law and evidence, and for misdirection of the learned Judge in his direction as above stated.

*Harrison*, Q. C., shewed cause. He referred to *Rush v. Baker*, 2 Str. 996; *Nicoll v. Glennie*, 1 M. & Sel. 592; *Edwards v. Hooper*, 11 M. & W. 363; *Lovell v. Martin*, 4 Taunt 779; *Atkin v. Slater*, 1 C. & K. 356; *Featherstonhaugh v. Johnston*, 8 Taunt. 237; 2 Wms. Saund. 47 m. note u.

*S. Richards*, Q. C., supported the rule. There was no evidence against Pennock. The receiving the proceeds of the sale did not make him liable if he did not give authority to sell: *Whitmore v. Greene*, 13 M. & W. 104; *Wilson v. Tumman*, 6 M. & G. 236; *Woollen v. Wright*, 1 H. & C. 554.

WILSON, J., delivered the judgment of the Court.

This was an action arising out of a private authority from Pennock to his co-defendant Armstrong, to sell under the chattel mortgage, in which Armstrong was expressly and directly the agent and bailiff of Pennock.

It is not at all like the case of a sheriff seizing or selling under an execution issued from a court. He acts under the process and as the officer of the court, and not as the agent of the execution creditor.

Besides that, Armstrong said he had been indemnified by Pennock. That, even in the case of an execution, would make the creditor indemnifying liable for the acts of the Sheriff: *Menham v. Edmondson*, 1 B. & P. 369; *Rush v. Baker*, B. N. P. 42; *Whitmore v. Green*, 13 M. & W. 111, per Pollock, C. B.; *Wilson v. Tumman*, 6 M. & G. 241, per Maule, J. And much more so will it make the private person liable who puts in direct action his own bailiff for the acts of the bailiff.

The evidence also shewed that Pennock, on being applied to about the seizure of the piano before its sale, referred the witness to his attorney for directions: *Atkin v. Slater*, 1 C. & K. 356.

That conduct, coupled with his knowledge that the piano was at the time of the sale in the hands of his agent, not acting for the landlord, who had forbidden it to be sold, but acting therefore for Pennock himself, and with his receipt of the money taken with a full knowledge of all the facts, are evidence against him of a conversion.

The rule must therefore be discharged.

*Rule discharged.*

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### MCKAY v. GRINLEY.

*Promissory Note—Stamps—Account stated.*

A note not properly stamped cannot be used as an acknowledgment to take a case out of the Statute of Limitations, or as evidence of an account stated.

The mere calculation of what is due as the balance of a former transaction, will not support an action on account stated.

ACTION on a promissory note for \$154, by payee against maker, and on an account stated.

Pleas to first count, 1. That there was not affixed to the note, at the time of its making, an adhesive stamp or stamps to the value of six cents, as required by the statute. 2. That although an adhesive stamp was affixed to the note at its making, the person affixing the same did not write or stamp thereon the date at which the same was affixed, and there was not written upon the stamp any material or integral part of the said note, or the signature of the defendant. To the second count, never indebted, payment, and Statute of Limitations.

The case was tried at Cornwall, before Galt, J., at the last spring assizes. The evidence was as follows: The plaintiff was called as a witness, and said—"The note was in settle-

ment of the accounts between myself and defendant; it was for the interest and balance of \$200 lent in 1853 and 1856; defendant promised verbally to give cattle if I would take them." The note was produced, and it was dated 13th July, 1868, and had two six cent stamps on it, cancelled 10th March, 1869.

A nonsuit was moved for, because the note was not properly stamped, and was void, and because it could not, in its present state, be used as an acknowledgment in writing to take the case out of the Statute of Limitations, which was pleaded to the account stated.

The learned Judge directed a nonsuit to be entered, reserving leave to the plaintiff to move to enter a verdict for him for \$170 damages, if the Court should be of opinion the plaintiff was entitled to recover.

In Easter Term last, *S. Richards*, Q. C., obtained a rule, calling on the defendant to shew cause why such verdict for the plaintiff should not be entered, pursuant to the leave reserved.

*Kerr* shewed cause. The note was not properly stamped; Dominion Act 31 Vic., ch. 9, sec. 11; *Lowe v. Hall*, 20 C. P. 244; *Henderson v. Gesner*, 25 U. C. R. 184; *Young v. Waggoner*, 29 U. C. R. 35; *Stephens v. Berry*, 15 C. P. 548; *Hoffman v. Ringler*, 29 U. C. R. 531. If the note was not properly stamped, can it be used as evidence to support the account stated? It is contended it cannot: *Ritchie v. Prout*, 16 C. P. 426; *Jones v. Ryder*, 4 M. & W. 32; *Tay. Ev.*, 5th ed., 946; *Parmiter v. Parmiter*, 3 DeG. F. & J. 461, 30 L. J. Ch. 508; *Nash v. Hill*, 1 F. & F. 198.

*S. Richards*, Q. C., supported the rule. The principal question is whether the note may not still be used as evidence to prove the account stated. The English Act prevents bills not stamped being used as evidence: *Green v. Davies*, 4 B. & C. 236; *Jones v. Ryder*, 4 M. & W. 32. Our statute does not exclude its being used in evidence. He also referred to *Baxter v. Baynes*, 15 C. P. 237;

*Field v. Woods*, 7 A. & E. 114; *Byles on Bills*, 9th ed., 113; *Gregory v. Fraser*, 3 Camp. 454. Here, independently of the note, there was such a parol accounting between the parties as gave a new cause of action on the account stated: *Addison on Contracts*, 1015, 6th ed.; *Smith v. Forty*, 4 C. & P. 126; *Ashby v. James*, 11 M. & W. 542.

WILSON, J.—I think the mere parol accounting, that is, the mere ascertainment by the parties of what was due as the balance of a former transaction, which is all that appears to have been done here, does not alter the situation of parties. Taking into account a set off, and striking a balance, constitutes an account stated: *Ashby v. James*, 11 M. & W. 542. Probably going over both sides of the account, debits and *payments*, and striking a balance, might also be an account stated. But simply calculating what is due on a previously ascertained transaction, is not a new cause of action, as an account stated: *Jones v. Ryder*, 4 M. & W. 32.

What took place here is not very plainly stated; and if more was done than I have collected from the evidence, the plaintiff should have a further opportunity of proving, if he can, the particular items that were gone over and settled at the time.

Under the words of the English Act, that unless the paper on which a bill or note be written be stamped, it shall not "be pleaded or given in evidence in any Court, or admitted in any Court to be good, useful, or available in law or equity," it has been distinctly held that a promissory note not duly stamped cannot be used as evidence of an acknowledgment in writing, to take a case out of the operation of the Statute of Limitations: *Jones v. Ryder*, 4 M. & W. 32; *Williams v. Gerry*, 10 M. & W. 296; *Parmiter v. Parmiter*, 30 L. J. Ch. 508.

The words of our Act are: save only in the case of double duty, any promissory note "shall be invalid and of no effect in law or in equity," and the person shall also incur the penalty of \$100 who becomes a party to any such note.

Now if an instrument is to be invalid, and further also if it is to be of no effect at law or in equity, it is a mere splitting of hairs to attempt to make any distinction between our statute and the Imperial enactment. If the instrument is to be of no effect at law or in equity, it is just the same as declaring that it shall not be pleaded or given in evidence in any Court, or admitted to be good, useful, or available in law or in equity.

It was not therefore admissible at the trial as evidence to prove an acknowledgment in writing by the debtor to take the case out of the statute. If it were admitted, the consequence would be that it would be made, against the direct words of the statute, of *some effect*, instead of no effect, in law; and that we cannot do.

As the plaintiff may be able to establish by parol a good accounting to sustain the count on the account stated, without regard to the note in question, the rule may go for a new trial on payment of costs by the plaintiff.

*Rule absolute for new trial, on payment of costs.*

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## MCCARTHY V. PHELPS AND HELLEMS.

*Promissory note—Presentment and notice.*

In an action by endorsee against endorser of a note, an averment of presentment and notice is supported by proof of a subsequent promise to pay, although it appears that there was in fact no proper presentment or notice.

So held, in accordance with *Kilby v. Rochussen*, 18 C. B. N. S. 357.

ACTION on two promissory notes made by defendant Phelps, payable to defendant Hellems, and by him endorsed to the plaintiff. Phelps allowed judgment to go against him, and the defendant Hellems pleaded that he did not endorse: that the plaintiff was not the holder of the notes: that the note was not duly presented; and no notice of dishonor.

The case was tried at the last Fall Assizes at Cayuga, before Wilson, J.

It appeared that the notes were not duly presented or notice given, the person who acted as notary having presented the notes to the indorser Hellems, instead of the maker Phelps: that one St. John, the then holder, saw the defendant Hellems the day after the irregular protest and told Hellems they were protested, and asked him to pay them. He replied he could not do so then, but that he had a car load of lumber which he would sell and pay him as far as it went, and give his note for the balance on the Thursday following. On another occasion he told St. John that if Phelps did not pay the notes by the following Friday or Saturday he would come in and settle with St. John. When the solicitor who made the irregular protest presented the notes to defendant Hellems, he asked if Phelps was not going to pay, when the notary giving his reasons for thinking not, viz., that he wished to renew them, and having renewals with him endorsed by Hellems. Hellems said, "I suppose I will have to pay them. Tell St. John I will be up in the morning and settle them."

Upon this evidence it was objected, that if the plaintiff relied on waiver of presentment and notice he should have so averred in his declaration, and if set out the evidence did not amount to a waiver. The learned Judge held that that no doubt on the third and fourth issues there was no presentment and notice, but that defendant's subsequent promise to settle the notes after he knew that they had been protested and Phelps had not paid, raised a *prima facie* case against Hellems, and that all precedent steps to make him liable as an indorser had been taken, and the learned Judge directed a verdict for the plaintiff, with leave to defendant to move to enter a verdict for him on the third and fourth issues. He also said that if it was necessary that the waiver should have been pleaded, he would allow it to be averred.

During last Michaelmas Term *James A. Miller* obtained a rule *nisi*, in pursuance of the leave reserved, to set aside the verdict, upon the ground that the evidence shewed that

there was in fact no presentment for payment, and no notice of non-payment or dishonor was given which would be sufficient in law, and that there was no waiver or dispensation thereof; and for misdirection, and for the reception of improper evidence, evidence of waiver having been allowed to be received which was not admissible under the pleadings; and that upon the evidence the verdict should have been entered for the defendant Hellems.

During the same term the case was argued, before Morrison, J., alone.

*Harrison*, Q.C., shewed cause, citing *Bank of British North America v. Ross*, 1 U. C. R. 199, 206; *McCuniffe v. Allen*, 6 U. C. R. 377; *Thompson v. Cotterell*, 11 U. C. R. 185; *Burke v. Elliott*, 15 U. C. R. 610; *Shaw v. Salmon*, 19 U. C. R. 512.

*Miller*, contra, relied upon *Kilby v. Rochussen*, 18 C. B. N. S. 357.

MORRISON, J.—Judgment must be for the plaintiff.

The case of *Kilby v. Rochussen*, 18 C. B. N. S. 357, is an express authority in his favor. That was an action against the drawer of a bill of exchange, to which was pleaded, among other pleas, no notice of the dishonor of the bill. It was conceded that no such notice was given, but the plaintiff swore that he saw the defendant after the bill became due, and told him that Wright, the acceptor, was unable to pay the bill, to which the defendant replied, "I think he is: I suppose I must." It was there objected, as here, that no notice in fact having been given, the above conversation did not sustain the allegation of notice in the declaration. Erle, C.J., reserved the point, and also leave to amend by substituting an averment of waiver. A motion was made to enter a verdict for defendant, or for a new trial. A rule *nisi* was refused, after hearing the defendant's counsel and taking time to consider. Williams, J., said: "The first question raised is, whether upon the evidence and the finding of the jury there is sufficient to

support the declaration as originally proved. I am of opinion that there was, because in effect the evidence was, that the defendant being informed of the dishonor of the bill, unqualifiedly promised to pay it. It must be assumed that no due notice of dishonor was given. It was contended by Mr. Denman, that, as it appeared that the defendant had *not* had notice, the promise to pay was not enough to support the allegation that due notice of dishonour had been given to him. I am, however, of opinion that there was sufficient evidence, because the defendant was informed that the bill had been dishonored, and afterwards promised to pay the amount. That operates as an acceptance by him of the notice given as a due notice. The jury therefore were not only justified in finding, but were bound to find, that the defendant had received due notice of dishonor. Even if that were so, we are still of opinion that there was sufficient to sustain the verdict, because the plaintiff had leave to amend his declaration by substituting an averment of waiver of notice for the averment of actual notice" And he was of opinion that there was no foundation for the rule, in which the rest of the Court concurred. And see *Rabey v. Gilbert*, 6 H. & N. 586.

In this case the evidence is much stronger in favor of the plaintiff than in the case of *Kilby v. Rochussen*.

The rule is therefore discharged.

*Rule discharged.*

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CURRIER ET AL. V. THE OTTAWA CITY PASSENGER  
RAILWAY CO.*Work and labour—Previous letter naming price, Construction of.*

The formation of a Street Railway Company being in contemplation, the plaintiffs, in January, 1867, wrote to one K., saying that the tamarac wood required for it could be got then, but not later, delivered at their mill at a price specified, and they, the plaintiffs, would saw it for not over \$3 per M., perhaps less; and they added that, if K. would start the stock list with \$5,000, they would venture to order the wood, and would agree to get the balance of stock taken. K. said that upon this, after communicating with the plaintiffs, he took the \$5,000 stock, and plaintiffs ordered the wood, and the company was formed, of which K. was made president. The sawing was not done until 1868, and the plaintiffs sued the Company for it, claiming \$4.25 per M. The case having been tried without a jury:

*Held*, the letter was properly treated as fixing the price to be paid at not more than \$3 per M.

*Quære*, whether, if there had been no communication with the plaintiffs after the letter, the defendants could have claimed the benefit of it as a representation intended to have been communicated to them, and on which they acted.

ACTION on the common counts.

Pleas—Payment into court of \$150, and never indebted and payment as to residue. Issue on the last two pleas. Replication, as to payment into court, that it is not sufficient to satisfy the plaintiff in respect of the matters to which it is pleaded.

The cause was tried before Galt, J., at Ottawa, without a jury, at the last Spring Assizes.

The question was, whether the sawing of certain lumber by plaintiffs for the defendants, for their purposes, should be \$3 or \$4.25 per M.

The letter on which the case turned had been written, on the 18th January, 1867, by one of the plaintiffs to Mr. Keefer, to induce him, as Mr. Keefer said, to get up the Company. It was as follows:

“Unless we can contract for the tamarac for street railway now, it cannot be got until another winter. A man up the Rideau will now contract to deliver it at \$10 per M. in the log. This is as cheap as can be expected. He will not, however, do this after another week passes. He will deliver it at our mill, and we will saw it for not over \$3 per M., perhaps less.

"If you, amongst you, will start the stock list with \$5,000, I will venture to order the tamarac, and will agree to get the balance of stock taken up. If this be not done now, it must be given up. I feel confident it would be a great advantage to the estate property there. Please declare what you will do without delay—say Monday."

Mr. Keefer, who was called for the defence, said: "I am President of the Company. We never heard anything more of the matter till the bill for sawing was sent in at \$4.25 per M., when I objected. Nothing was said about the price till the sawing was done. The sawing was not done till 1868. Mr. Currier bought the timber. I took the \$5,000 stock. The letter was acted on. I wrote an answer to it; if I did not I went and saw Mr. Currier, and spoke to him. I subscribed the stock, and got up the company on the faith of the letter. Mr. Currier was the sole manager."

The learned Judge decided that if Mr. Keefer acted on the offer made in the letter, and was thereby induced to change his position by subscribing the stock, that the price therein stated was the price to govern, and he gave a verdict for the defendants.

The defendants' counsel objected to the ruling.

*Harrison*, Q.C., obtained a rule *nisi* for a new trial, for misdirection of the learned Judge, in ruling that if Mr. Keefer acted on the offer made in the letter, and was thereby induced to change his position by subscribing the stock which he took in the defendants' Company, that only the price for the work done by the plaintiffs should be allowed to them which was stated in the said letter; or because the verdict was contrary to law and evidence, and the weight of evidence.

*S. Richards*, Q.C., shewed cause. Although there was no binding contract between the plaintiffs and Keefer by the letter referred to, yet when the plaintiffs did the work therein mentioned, it must be assumed, as there was no notice to the contrary, that the plaintiffs did the work upon the terms before agreed upon.

*Harrison*, Q.C., supported the rule. The letter was plainly no estoppel, and it was not acted on promptly, as it should have been; not for many months after its date. And this letter, being at most only an expression of intention, the performance of which could not have been enforced, and not a legal contract, nor a misrepresentation of any existing fact, should have had no weight whatever given to it by the learned Judge at the trial: *Jorden v. Money*, 5 H. L. Cas. 185.

WILSON, J., delivered the judgment of the Court.

If the sawing had been work to have been done for Keefer, I incline to think it would have been a contract between the plaintiffs and Keefer.

Whether the defendants can claim the benefit of it or not, on the ground of a representation intended to have been communicated to them, and on which they acted, we are not bound to consider.

There was sufficient evidence that Mr. Keefer had made some communication to the plaintiffs on getting the letter, and that he believed the letter was still a subsisting proposal between them. It was most assuredly acted upon by Keefer, who subscribed the \$5,000 stock, and by the plaintiffs, who procured the tamarac logs, and who were instrumental in getting up the residue of the capital stock of the Company. Upon such evidence it was fairly a question, and indeed a presumption in favor of the defendants, unless the contrary was shewn by the plaintiffs, that the prices stated in the letter were the prices to regulate the work which was done for the defendants.

The finding of the learned Judge can certainly be sustained on this ground, without regard to the letter at all, on which we abstain from expressing any opinion.

The rule will therefore be discharged.

*Rule discharged.*

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IN THE MATTER OF GEORGE CHAFFEY AND WILLIAM CHAFFEY, FORMERLY DOING BUSINESS AS THE FIRM OF GEORGE CHAFFEY & BROTHER, AS A CO-PARTNERSHIP, AND ALSO WILLIAM CHAFFEY, HAVING A PRIVATE ESTATE, INSOLVENTS; AND THE MERCHANTS' BANK OF CANADA, CLAIMANTS, NOW APPELLANTS; AND GEORGE DAVIDSON AND MICHAEL DORAN, CREDITORS OF THE SAID FIRM, CONTESTANTS, NOW RESPONDENTS.

*Insolvency—Claim against a firm, and one partner separately.*

The appellants, in the matter of C. & Co., insolvents, had a claim upon a note made by C. & Co., payable to C., one of the firm, and by him endorsed to the appellants. They proved against the firm on the 3rd July, 1869, but afterwards withdrew it, and proved on the 11th January, 1870, under sec. 60 of the Act of 1869, specifying and putting a value on the separate liability of C.

*Held*, affirming the decision of the County Judge, that the appellants, under the Act of 1864, could not rank both upon the separate estate of C. and on the estate of the firm, but must elect; but that they might prove against the joint estate for their whole claim, without deducting from it the value of C.'s separate liability.

*Held*, also, that the appellants could treat the payee and endorser as having incurred a separate liability by his indorsement, distinct from his joint liability as a maker.

*Held*, also, that the Act of 1869 could not apply, for the case was pending before it, and the question in dispute as to the right to prove was not a matter of procedure only, exempted from the exceptions in the repealing clause.

APPEAL from the decision of the Judge of the County Court of the County of Frontenac.

The appeal stated that the insolvents made an assignment, under the Act of 1864, to James Grant Macdonald, on the 3rd of March, 1868: that the part of the appellants' claim now in dispute was on a promissory note for \$56,000, dated the 26th of November, 1867, made by George Chaffey & Brother, payable three months after date to William Chaffey (the brother and co-partner of George Chaffey) or order, and by him endorsed to the appellants: that the appellants proved their claim on the joint estate of the partnership on the 3rd of July, 1869: that such proof was afterwards withdrawn by them, and they proved on

the 11th of January, 1870, under section 60 of the Insolvent Act of 1869, specifying that they held the liability of William Chaffey, one of the partners, as security for the said debt, and they therein put a value on such separate liability: that the assignee allowed the claim as last proved, and the same was entered on the dividend sheet of William Chaffey's estate, and for the balance over and above the value put upon the liability of William Chaffey, placed upon the dividend sheet of the estate of Chaffey & Brother.

The respondents appealed to the assignee, objecting to the bank proving on the two estates, and to the withdrawal of the former proof and putting in the new proof, as was done.

The bank answered the objections, and the assignee made his award, to the effect that the bank made no election to prove on the estate of the partnership: that the Act of 1869 having laid down a special mode of procedure in such a case as the present, and no action having been taken or claims filed against the estate up to the time of the passing of the Act, it was competent to the bank to withdraw its first affidavit filed, and to substitute another conforming in its terms to the method of procedure stated in the new Act; and that the claim, as now placed on the dividend sheet, was properly so placed: that there appeared no reason, looking to the Act of 1864, why the separate estate of a partner should not be held responsible for his separate liability, nor why his endorsement of the note of the firm should not constitute a separate liability: that the 60th section of the Act of 1869 implied that in such a case as the present the double liability did exist prior to its passing, but that no specific mode of ranking was provided by the previous Act: that by the 154th section of the late Act, all questions of procedure in matters pending at the passing of the Act are to be subject to the provisions of the Act, and that the manner of proof is a question of procedure.

The claim of the bank was therefore confirmed.

The respondents appealed against the award of the assignee to the Judge of the County Court; and the learned Judge gave judgment to the following effect:—

The firm of Chaffey & Brother became insolvent in February, 1868. Davidson & Doran appear on the dividend sheet as unsecured creditors of the firm for \$21,956.16. The Merchants' Bank appear on the same sheet as secured creditors for the sum of \$167,586. Davidson & Doran proved their claim about the 11th January, 1870. The bank proved its claim on the 3rd July, 1869, against the firm, as unsecured creditors, and that claim was allowed. Afterwards, about the 11th of January, 1870, the bank withdrew its claim, and proved anew the same claim, and that they held as security therefor the promissory note for \$56,000 endorsed by William Chaffey, one of the insolvents, which security the bank valued at \$12,000.

Two dividend sheets were prepared, each of them being entitled, "First Dividend Sheet." One is a dividend sheet of the estate of the firm, shewing a dividend of  $17\frac{1}{2}$  per cent.: the other is a dividend sheet of the separate estate of William Chaffey, shewing a dividend of 10 per cent. On both of these sheets the bank is a creditor, and on the separate estate sheet the only creditor. The assignee allowed both claims.

Two points arise: 1st, Whether the present case is affected by the Act of 1869; and 2nd, Whether the liability of William Chaffey by his endorsement of the promissory note constitutes such a separate liability as will enable the creditors holding it to prove it, and to rank upon his separate estate to the exclusion of other creditors for such amount as it may be worth, and afterwards, for the remainder of the claim, upon the general estate of the firm.

On these points I am of opinion the award of the assignee cannot be supported. The present case having occurred before, and being actually pending at the time of the passing of the Act of 1869, is exempted from its

operation, except as to matters of procedure merely. The matter in dispute does not seem to me to be a matter of procedure merely—that is, a question as to the form or manner of proceeding—but to involve a question as to the very substance and merits of the case.

The cases which were cited on the argument dispose of the second question, and shew that when a creditor holds a bill of exchange of a firm, endorsed separately by one of the partners, and is aware of the partnership of the endorser with the drawers (which this bank undoubtedly was, as the fact was notorious), such creditor will not be permitted to prove and rank upon both the estates of the firm and of the separate partner, but must elect upon which estate he will rank.

The cases cited were English decisions, but they were decided on principle, and there is nothing in our Statute of 1864 which conflicts with them.

I am of opinion, therefore, that the bank must elect upon which estate it will rank, and that it is not precluded from still exercising such right; but it cannot be allowed to prove on both estates.

The award must therefore be modified, to permit the bank to make an election; and it is directed that the proof against the estate which the bank may elect not to rank upon shall be expunged.

An order was made in pursuance of such opinion of the learned Judge.

Against this order the bank appealed, for the following reasons :

1. That the award of the assignee is correct in this, that the claim of the appellants is in no way altered by the Act of 1869, but a mode of proof is prescribed by that Act, and proving a claim is only a matter of procedure.

2. That the appellants are entitled to rank for the note for \$56,000, upon the individual estate of William Chaffey *pro rata* with his individual creditors, and upon the estate of the firm for the balance, after deducting the value placed by the appellants on the liability of William Chaffey, *pro rata* with the creditors of the firm.

*Britton*, for the appellants. The 60th section of the Act of 1869 is directly in the appellants' favour, unless the fact of the assignment having been made under the Act of 1864 prevents its application. But it does not, because, in this case, the proof was under the Act of 1869, and because the proving on each estate is a matter of procedure only, under section 154. The English decisions before the Act of 1861, sec. 152, no doubt prohibited the ranking on the two estates, as the appellants claim to do; they compelled the creditor to elect on which of the estates he would prove: *Arch. Bankruptcy*, 670 to 675; *Ex parte Moult*, *In re Barrow*, 2 Deac. & Ch. 419; *Ex parte Bank of England*, 2 Rose 82; *Goldsmid v. Cazenove*, 5 Jur. N. S. 1230; S. C., 7 H. L. Cas. 785; *Ex parte Moult* 1 Deac. & Ch. 65; *Ex parte Bevan*, 10 Ves. 109; *Story* on Partnership, secs. 384, 386, 388; though in *Ex parte Moult*, 2 Deac. & Ch. 444, the rule is said to be arbitrary, and not founded on reason. The Imperial Act of 1861, sec. 152, was passed to remove this injustice: *Arch. Bankruptcy*, 675. The former rule will not be applied unless to cases strictly bankruptcies: *Ex parte Thornton*, 28 L. J. Q. B. 5. By the former law the creditor might enforce his remedies against any specific security which he held, while still ranking on the estate for the debt secured: *Arch. Bankruptcy*, 678; *Ex parte Peacock*, 2 Gl. & Jam. 27; *Ex parte Connell*, 3 Deac. 201; *Ex parte Adams*, 3 Mont. & Ayr. 157; *Ex parte Hallifax*, 2 Mont. & DeG. 544; *Rolfe v. Flower*, L. R. 1 P. C. 27, 46. Sec. 5, sub-sec. 7, of the Act of 1864, is in favour of the appellants' contention, though before the Act of 1869 there might have been difficulty in working it out, and sec. 60 of that Act was passed to remedy this. The Act of 1869, sec. 133, allows of new proof being made.

*S. Richards*, Q.C., and *McLennan*, for respondents. The case must be decided by the Act of 1864. The appellants could not rank on the two estates. They must make an election on which of them they will claim: *Deacon* on Bankruptcy, 838; *Rixon v. Emary*, L. R. 3 C. P. 546.

The Act of 1869 was not intended to take away the rights of parties which they had before the passing of the Act. The other creditors had, before that Act, the right to call on the estate of the individual partner, and to share in it equally with the appellants. This right the appellants claim now to deprive the other creditors of. The appellants had proved their claim before the Act of 1869 on the partnership estate, and cannot be allowed to expunge all that, and to proceed anew, altering the rights of others: *Ex parte Goldsmid*, 1 DeG. & J. 284; *Ex parte Thornton*, 3 DeG. & J. 458; *Ex parte Carne*, L. R. 3 Ch. App. 463. There is a further difficulty in this case in the way of the appellants' demand: the promissory note made by the firm payable to one of the members of the firm could not have been sued on by the payee, because he would in effect have been both a plaintiff and a defendant: *Byles on Bills*, 7; *Moffatt v. Van Millengen*, 2 B. & P. 124, note (c); *Teague v. Hubbard*, 8 B. & C. 345; *Beecham v. Smith*, E. B. & E. 442. The note was, when made, in effect payable to bearer, though in form payable to the order of William Chaffey, and when he endorsed it in blank he constituted the bank the bearers of it, and as such bearers they could not sue William Chaffey, whose name was, in law, not upon the note at all: *Hooper v. Williams*, 2 Ex. 13; *Absolon v. Marks*, 11 Q. B. 19; *Brown v. DeWinton*, 6 C. B. 336. There could not therefore be any proof on his separate estate at all.

WILSON, J., delivered the judgment of the Court.

As to the form and effect of the note in question, the Court, in *Brown v. DeWinton*, 6 C. B. 362, said: "A note payable to the maker or his order, before it is endorsed, is in the nature of a promise to pay to the person to whom the maker by endorsement orders the amount to be paid, and after the note is endorsed and circulated, it must be taken as against the party so making and endorsing, that he intended his endorsement should have the same effect as an endorsement by the payee of a note payable to the order of a person other than the maker would have had,"

And in *Beecham v. Smith*, E. B. & E. 442, which was an action by payees of a joint and several promissory note against one of the makers, and it appeared one of the plaintiffs was one of the joint and several makers of the note, the Court held that as the defendant was sued on his *several* and not on his joint liability, the facts set up were no defence to the action.

In the present case, on the authority of these two decisions, the opinion we form is, that the bank can, as against the makers and endorser, treat the payee and endorser as having incurred a separate liability towards third persons in respect of his endorsement, distinct from his joint liability as a maker. The note must be construed as having the effect it appears to have on its face as against the makers and payee.

If it were otherwise, a stranger to the partnership members might be prejudiced by taking and acting on an instrument regular in form, and which the members had made and circulated as a complete, formal, and valid instrument, when he had every reason to believe that it was just as it purported to be, a legal promissory note in its making and in its endorsement. It is not, however, really necessary to decide that point.

The question then is, have the appellants the right to rank on both the joint and the separate estate? That depends, firstly, upon the effect of the Act of 1864, and, secondly, upon the effect of the Act of 1869, and whether it can be held to apply to this case, commenced before it came into operation.

In England, before the 24 & 25 Vic., ch. 134, the rule was quite settled, that though in many cases a creditor had the option of considering his debt joint or separate, and of proving either as a joint or separate creditor under a joint adjudication, or prove and receive dividends under a separate adjudication, yet he cannot prove both on the joint and on the separate estate; he has merely an option to do the one or the other, and this although the debt was secured against each estate by a distinct and independent instrument.

But this rule does not hold, it is said, when the creditor who holds the double security of the firm and of one of the partners had no knowledge of the partner being a member of the firm.

The object of preventing a double proof was to save the entire surplus of the estate not proved on for the benefit of all the creditors equally who ranked on the other estate. To admit one joint creditor to rank both on the joint and separate estate would be an injury to the joint creditors, by diminishing the surplus of the separate estate, which should go to the joint creditors generally, after satisfaction of the separate creditors.

It is said by Lord Cranworth, in *Goldsmid v. Cazenove*, 5 Jur. N. S. 1232, there was very little principle in the rule; it must be taken to have been laid down for purposes of convenience, somewhat empirically or arbitrarily. The rule has certainly been established for many years in England, and is not to be disturbed: See the cases referred to in *Rolfe et al. v. Flower et al.*, L. R. 1 P. C. 27, and *Ex parte Carne*, L. R. 3 Ch. App. 463.

By our Act of 1864, sec. 5, sub-sec. 4, "no dividend is to be paid to any creditor holding collateral security from the insolvent for his claim, until the amount for which he shall rank as a creditor on the estate as to dividend therefrom shall be established as hereinafter provided."

Sub-sec. 5: "A creditor holding security from the insolvent, or from his estate, shall specify the nature and amount of such security in his claim, and shall therein, on his oath, put a specified value on such security; \* \* \* and in either of such cases the difference between the value at which the security is retained or assumed" (by the creditors) "and the amount of the claim of such creditor, shall be the amount for which he shall rank and vote as aforesaid." See also sec. 11, sub-sec. 4.

Sub-sec. 7: "If the insolvent owes debts both individually and as a member of a co-partnership, or as a member of two different co-partnerships, the claims against him shall rank first upon the estate by which the debts

they represent were contracted, and shall only rank upon the other after all the creditors of that other have been paid in full."

Is this endorsation of the *separate* partner, William Chaffey, on the adjudication of the *partnership* estate, "a collateral security from the *insolvent*" under sub-sec. 4; or "holding security from the *insolvent*, or from *his estate*," under sub-sec. 5; or, "a security which the creditor holds for the payment of *his claim*," under sec. 11, sub-sec. 4?

It is a security for the payment of his claim under the last section, but in my opinion that section must be read in connection with the 4th and 5th sub-sections; and, plainly, the individual security of a partner is not on the adjudication of the partnership estate a security "from the insolvent, or from his estate."

In *Rolfe v. Flower*, L. R. 1 P. C. 46, Lord Chelmsford, in delivering the judgment, referred to the language of Lord Lyndhurst in the case of *Re Plummer*, 1 Ph. 60, in which he said: "In administration under bankruptcy, the joint and separate estates are considered as distinct estates, and accordingly it has been held that a joint creditor, having a security upon the separate estate, is entitled to prove against the joint estate without giving up his security, on the ground that it is a different estate. That was the principle on which *Ex parte Peacock*, 2 Gl. & J. 27, proceeded, and that case was decided first by Sir John Leach, and afterwards by Lord Eldon, and has since been followed in *Ex parte Bowden*, 1 Deac. & Ch. 135;" and Lord Chelmsford adds: "Whatever may have been the origin of the rule, it must now be considered to be the established law in this country."

In the case last referred to in the Privy Council, it was held that under a Statute of the colony of Victoria which enacted "that any creditor who shall have or hold any security or lien upon any part of the insolvent estate shall," by affidavit, "put a value upon such security," &c., the creditor of a bankrupt partnership was not obliged to value or deduct the value of a security he held from cer-

tain members of the partnership for his claim on the partnership, because the security was upon a different estate.

If the Act of 1864 does not apply to such a security, the creditor remains as he was by the general rule and course of law in such a case, and he retains his security without making a deduction from his partnership claim in respect of it.

The 7th sub-section of sec. 5, as to having a claim both on the partnership and on the member, is only a declaration of what the law was and had been before, and does not aid in this case.

We are also of opinion that the specifying the value and amount of a security held, and putting a value on it under oath, and the other proceedings to be taken with respect to it, is not "a matter of procedure merely," under the 154th section of the Act of 1869, and therefore, by that section, the previous Acts, so far as they relate to proceedings commenced and pending thereunder when the Act of 1869 was passed, "remain in force and are to be acted upon as if this Act had never been passed;" and therefore, for the purposes of this appeal, the Act of 1869 may be laid altogether out of view.

Notwithstanding anything in the Act of 1864, we are of opinion the appellants were not bound to value the security which they held by the endorsation of the separate creditor, and to deduct it from their claim.

It does not come into consideration under that Act, as it would if the Act of 1869, by the 60th section, were held to apply.

The appellants are entitled to rank on the partnership estate, without deduction in respect of the value of the endorsement.

But they are not, by anything contained in the Act of 1864, entitled to rank on the separate estate of William Chaffey, in respect of his individual liability, contrary to the rule of law adopted and uniformly acted upon in like cases, as well as upon the joint estate.

They must elect to prove upon one estate or the other ; they cannot rank on both. And in our opinion sec. 5, sub-sec. 7, directly favours and directly decides this question.

The judgment of the learned Judge will therefore be affirmed, and the appeal be dismissed, with costs to be paid by the appellants.

We have only to add that, in proving again, the bank is not to value the specific security and deduct it, but may rank on the partnership estate for their full partnership claim, without deduction in respect of the security on the separate estate.

*Appeal dismissed.*

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IN RE MOTTASHED AND THE CORPORATION OF THE  
COUNTY OF PRINCE EDWARD.

*By-law—Application to quash—Absence of seal—Licenses to sell liquors.*

On application to quash a by-law passed on the 21st December, 1869 under the Temperance Act of 1864, to prohibit the sale of intoxicating liquors, and submitted to the electors on the 2nd February, 1870, it appeared that no seal had been attached to the by-law until after the 2nd March, 1870.

*Held*, that it was no by-law, and therefore could not be quashed ; but the rule to quash it was discharged without costs.

Remarks as to the effect of the Tavern and Shop License Act of 1868, 32 Vic., ch. 32, Ont., upon the Temperance Act of 1864.

*Jellett* obtained a rule *nisi* to quash a by-law entitled "A By-law to prohibit the sale of Intoxicating Liquors, and the issuing of Licenses therefor, in the County of Prince Edward," and purporting to be passed on the 21st day of December, 1869, on the grounds, amongst others :

1. That the Temperance Act of 1864, in so far as it provides for prohibiting the sale of intoxicating liquors, and the issuing of licenses therefor, is repealed or superseded by the Statute of Ontario, "The Tavern and Shop License Act of 1868," 32 Vic., ch. 32.

2. That at the time of the vote, and after the passing of the by-law, and on the 2nd day of March, 1870, there was no seal of the corporation affixed to the said by-law.

There were seven other grounds of objection taken, which it is unnecessary to mention here, as they are not noticed in the judgment.

The by-law enacted that from and after the 1st March, 1870, the sale of intoxicating liquors, and the issuing of licenses therefor, is prohibited within the county of Prince Edward, in accordance with the provisions of the Temperance Act of 1864; and that the by-law should have no effect unless approved of by the electors in accordance with said Act.

The copy produced was certified by one Robert Boyle, the clerk of the corporation, under his hand and the corporate seal, and annexed to the copy and certificate were the following affidavits: 1. By David John Pruyn, student-at-law, that he was personally present and did see the annexed certificate of a copy of a by-law duly signed by Robert Boyle, at the town of Picton; and that he knew the said Robert Boyle, who, as he was informed and verily believed, was clerk of the corporation. 2. The applicant, Jonathan Mottashed, swore that, "I received the within certified copy of a by-law passed by the council of the municipality of the county of Prince Edward from Robert Boyle, clerk of the above named corporation, through Richard John Fitzgerald, my attorney in this matter." 3. In another affidavit Mr. Mottashed swore that he was a resident of the town of Picton, where he had for many years kept an inn, and that he was interested in having the by-law quashed.

Mr. Pruyn, in a separate affidavit, swore that on the 28th February, and again on the 2nd March, 1870, he inspected the books of the clerk of the corporation, the by-law in question therein contained, and the papers concerning the same filed in the said clerk's office: that there was not, on either of the said days, the seal of the corporation affixed to said by-law: and that on the 9th March,

following, having heard a rumour that a seal had since been affixed, he again inspected said by-law, which had then the corporate seal affixed.

The vote upon the by-law was taken on the 2nd February, 1870.

*C.S. Patterson* shewed cause. He objected that the by-law was not properly before the Court : that it did not appear to be under the hand of a member of the municipality, so as to bring it under the 193rd section of the Municipal Act ; and the affidavits filed did not shew *that it was received from the clerk*, so as to bring it under section 198 of the Statute : *Fisher v. The Municipality of Vaughan*, 20 U. C. R. 492.

As to the seal to the by-law, there is no express provision as to the time when the seal is to be placed there. Section 2 of the Temperance Act of 1864 says the by-law is to be drawn up and passed in the ordinary form. Before the by-law can be finally passed, or come into operation, it must be submitted to the people, and it is not necessary to put the seal to it until it is finally passed. The affidavit filed on behalf of the defendant only means that the transcript which he saw was not sealed ; it does not shew what connection there is between Pruyne, who makes the affidavit, and the party applying to quash the by-law : *Gibson and the Corporation of Huron and Bruce*, 20 U. C. R. 117 ; *Croft and the Municipality of Brooke*, 17 U. C. R. 269.

*Jellett*, contra. The Acts of 1864 and 1869 are quite inconsistent with each other. Under the former Act the city corporations were authorized to pass the prohibitory law. Under the Act of 1869 the commissioners of police in the cities are now the persons to make provision for regulating the granting of licenses therein. The Act contemplates a different proceeding from that set forth in the Act of 1864. It provides for the same objects, and evidently is intended to be substituted for it. The 6th section enacts that the council of every township, town,

and incorporated village, and the police commissioners in cities, may respectively pass by-laws; then the following nine sub-sections define the purposes, and, among them, (7) for prohibiting the sale by retail in any house of public entertainment, and prohibiting altogether the sale thereof in shops and places other than houses of public entertainment. There is no officer now known to the law who can perform the duties prescribed to the officer of the inland revenue under the Act of 1864. Suppose a by-law under the Act of 1869, would that be suspended by the provisions of sub-sec. 2 of sec. 8 of the Act of 1864? The imprisonment for penalties under the Act of 1864 is three months; under that of 1869 thirty days. The power which adjacent councils had under the Act of 1864, sec. 10 and sub-sections, to pass the same by-law, does not exist under the Act of 1869. The power of appeal is taken away under the Act of 1869: under sec. 36 of the Act of 1864 the writ of *certiorari* to remove the record is taken away, and the right to appeal also, unless the decision is before certain kinds of magistrates, judges, &c. The affidavit shews sufficient to call on the corporation to satisfy the Court that the by-law had a seal to it on the 2nd March. The Municipal Act of 1866, sec. 192, requires that the by-law should have a seal.

RICHARDS, C. J., delivered the judgment of the Court.

As to the preliminary objection, it seems strange that the course pointed out by the 198th section of the statute, so plain and so simple, is so often disregarded, and something which appears more difficult done in substitution. If the person who received the copy of the by-law now moved against from the clerk of the municipality had made an affidavit of that fact, there could have been no difficulty, because it is certified under the hand of the clerk, and under the corporation seal. But here the more difficult, and of course more doubtful, method is resorted to.

In *Fisher v. The Municipality of Vaughan*, 10 U. C. R. 494, the late Sir J. B. Robinson, in regard to the prelimi-

nary objection as to the copy of the by-law not being properly authenticated, said: "The relator swears that the copy now before us was received by Troyer from the clerk, and was delivered by Troyer to him, the deponent; and moreover, he swears that it is a true copy."

The statement of Mr. Mottashed, that he received the copy from the clerk through his attorney, is not perhaps quite as strong as that the clerk delivered it to the attorney and the attorney to him, though he might well swear to this from his own personal knowledge in either case, as he might have been present when the attorney received it for him.

In *Buchart and the Municipality of Brant and Carrick*, 6 C. P. 134, the late Chief Justice Draper of this Court, when Chief Justice of the Court of Common Pleas, stated that the Court ought not, without sufficient cause shewn on affidavit, to dispense with a production of the copy of the by-law, certified as the section requires.

In the view we take of the matter, it is not absolutely necessary to decide that the proof of the copy of the by-law moved against is not sufficient, under the 198th section of the Act, to authorize us to quash the by-law, if sufficient cause be shewn to authorize us to do so; for the affidavits filed satisfy us that the by-law, on the 1st or 2nd of March last, long after it was passed and approved of by a majority of the freeholders of the county, if it was so approved, was not under the seal of the corporation.

The 192nd section of the Statute makes it necessary it should be under their seal, and we can see many reasons why the Legislature should desire that the passing of by-laws should be a matter of some gravity, and that they should be verified by the seal of the corporation affixed at the time of passing: most people being inclined to consider instruments under seal of greater importance than those merely signed.

In *Boulton and The Town Council of Peterborough*, 16 U. C. R. 388, Sir J. B. Robinson said: "Our authority

to quash by-laws, as given by the Statute, is where the by-law appears to us to be either wholly or in part illegal. This seems, as we have intimated in other cases, to have reference to what we shall find on the face of the by-law, whereas the objections we have been considering are of another character. We do not doubt our power to quash a by-law where it is shewn to us that it has been passed illegally, as without some notice or other formality required, which appears to be essential to the right of the municipality to pass it; but where we interfere on that ground, it is, as we conceive, rather under the jurisdiction vested in us at common law than under the Municipal Act. And where that is the case we have a discretion not to interfere on summary application, but to leave it to the party complaining, if he pleases, to test the validity of the by-law by resisting its operation, or by bringing an action for anything done under it, as he may be advised."

In *Buchart and The Municipality of Brant and Carrick*, already referred to, Chief Justice Draper said: "In moving against a by-law there are two things to be established: first, that a by-law was passed; second, that the copy offered to the Court is a true copy." The difficulty here is to shew that a by-law was passed, inasmuch as it wanted a seal.

In *Croft and The Municipality of the Township of Brooke*, 17 U. C. R. 269, Sir J. B. Robinson said: "The Statute requires that by-laws of municipal corporations shall be authenticated by the seal of the corporation. If this is not sealed, and it appears that it is not and never was, it follows that what we are asked to set aside is not a by-law, and we have no power to quash it, nor is there any need that it should be quashed."

It is true, in the case quoted from, at the time the copy of the by-law was obtained there was not a seal to it, but if the seal was not put to the by-law when it was passed, it would surely not make it a good by-law to put the seal to it three months after it was passed, and when the persons composing the governing body of the corporation

were entirely changed. It seems to us, under the plain words of the Act, it could not be a by-law at all unless it was under the seal of the corporation. If the seal was not affixed to it until after the 1st of March, then it is not an operative by-law now, and ought not to be observed, nor be made use of to prejudice the party who now seeks to quash it, inasmuch as it has not been approved of since it became a by-law by the electors of the county ; or it is in fact void because it had not the seal affixed to it at the time of passing, or within a reasonable time thereafter, or at all events before the time for submitting it to the approval of the electors.

It appears that the party applying to quash the by-law has suffered serious injury from its passage, as shewn by him in his affidavit, by the refusal of the municipality in which he resides to grant him a license to sell wine, &c., because they consider the county by-law operative and in force, he before that having carried on the business of an innkeeper. We take it for granted, however, on this expression of opinion by the Court, that the municipality will not feel themselves bound by the by-law, which we would set aside on the objection taken, were it not for the rule of decision referred to in the case last cited, from 17 U. C. R.

We may further add, though not necessary for the disposal of the case, that it seems to us that many, if not most, of the provisions of the Act of 1864, referring to the granting of licenses and the preventing the issuing of licenses, and for prosecuting and punishing parties for violating the laws made on those subjects, are superseded, if not repealed, by the provisions of the Statute of Ontario, 32 Vic., ch. 22. At all events, it would be much more satisfactory if the Legislature of the Province at its next sittings should repeal those sections of the Act of 1864 which are inconsistent with the Act of 1869.

Under all the circumstances, we think we should discharge the rule, but without costs.

*Rule discharged.*

## SNELL AND THE CORPORATION OF THE TOWN OF BELLEVILLE.

### *Municipal Corporations—Regulations of markets—Sale of meat.*

- A By-law of a town for the regulation of the market, enacted—1. That only butchers and persons occupying shops or stalls in the market, or in two specified wards of the town, for the sale of fresh meat, should sell, or expose for sale, in any less quantity than by the quarter: that such butchers and persons might so sell at these places, but not otherwise; and that no person should sell any fresh meat in the town except in the market stalls or such place as the council should appoint, not less than 400 yards from the market, and within certain specified limits in the two said wards.—*Held*, valid.
2. That no person should buy, sell, or offer for sale, any game, fish, poultry, eggs, butter, cheese, grain, vegetables, or fruits, exposed for sale or marketed in the town, until the seller had paid the market fees, or obtained a ticket from the collector of market tolls, as provided in a by-law referred to, and before a specified hour of the day: that no person should forestall, regrate, or monopolize any of the articles mentioned, within the town; and that before noon no butchers' meat, fish, hay, or straw, should be bought or sold in the town except at the market and in the shops or stalls in the two said wards. *Held*, valid, under the powers given by the Municipal Act of 1866, sec. 296, subsec. 9, and subsec. 10 as amended by 33 Vic. ch. 26, sec. 6, O, and subsec. 11.
3. That before 10 A.M. no huckster or runner within the municipality, or within one mile of its limits, should purchase any meats, fish, or fruit brought to the public market. *Held*, bad, as not confined to those *living* within the municipality or a mile therefrom; and *Quære*, whether it should not exclude persons buying for their own use, not to resell.
4. That every person selling meat or articles of provision by retail, whether by weight, count, or measure, should provide himself with scales, weights, and measures, but no spring balance, spring scale, spring steelyards, or spring weighing machine, should be used for any market purpose. *Held*, valid, under subsec. 10 above mentioned, and Consol. Stat. U. C. ch. 58.
5. That persons offending against the by-law should, on conviction by a magistrate, be fined not less than \$1 nor more than \$20, and in default of payment be imprisoned for not less than two nor more than twenty days, which fines should be applied to the uses of the municipality. *Held*, that leaving the fine in the magistrate's discretion was clearly authorized by sec. 209; but that it was invalid for not awarding a moiety of the fine to the informer, under sec. 211.
- Held* also, that market regulations made by the council might be quashed as orders or resolutions, under sec. 198.
- By these regulations it was provided that any person wishing to sell fresh meat in quantities less than a quarter in a shop or stall in either of the two wards above mentioned, should apply to the market committee, stating the annual sum above \$40 which he was willing to pay for a certificate authorizing him to sell for a year. *Held*, bad, both by the general law, and as opposed to sec. 220 of the Act of 1866. It was also provided that persons obtaining certificates should give a bond with sureties to obey the by-laws relative to the sale of fresh meat at stalls and shops where it was sold. *Held*, good, for that it applied of course only to valid by-laws.

IN Hilary Term last, *Harrison*, Q. C., obtained a rule calling on the town of Belleville to shew cause, on the first day of Easter Term following—

1. Why the first clause of by-law No. 217 should not be quashed, with costs, for illegality—the same being in excess of the powers of the corporation, or unreasonable, or otherwise illegal.

2. The second clause of the same by-law was also moved against; but this it appeared had been repealed on the 17th February, unknown to the applicant, before the rule *nisi* was moved.

3. Why the third clause of the same by-law should not be quashed, with costs, for illegality—the same assuming to restrain the sale of the articles therein first enumerated unless a certain fee be paid, thus in effect levying a tax on all such sales made within the town, and prohibiting all persons before the hour of twelve o'clock noon from purchasing or selling butchers' meat, fish, hay, or straw, except at the public market places, and in the stalls or shops in Coleman ward and Baldwin ward, and prohibiting hucksters or runners, before the hour of ten o'clock in the forenoon, within the municipality, or within one mile of the outer limits thereof, from purchasing meats, fish, or fruits, brought to the public market; or,

4. Why the fourth clause of the same by-law should not be quashed, with costs, for illegality—the same making it obligatory upon every person selling meat, or any articles of provision by retail, whether by weight, count, or measure, in the town, to provide himself with scales, weights, and measures for the town, and providing that no spring balance, spring scales, spring steelyards, or spring weighing machine, shall be used or allowed to be used for any market purpose; or,

5. Why the fifth clause of the same by-law should not be quashed, with costs, for illegality, in this, that the by-law does not itself fix and determine the punishment, but delegates the same to be fixed and determined within certain limits by the discretion of the convicting Justice;

and because it provides in general terms that all fines shall be applied to the uses of the municipality, and no moiety thereof in any case to go to the informer or prosecutor;—and on grounds disclosed in affidavits and papers filed.

And why the regulations for the government of the market and meat stalls of the town should not be quashed, with costs, for illegality, the same providing for and making it necessary to have certificates or licenses for the sale of fresh meat, and the giving of bonds conditioned to abide by all the regulations and by-laws of the municipality in force at the time of entering into the bonds, and all by-laws and regulations which may thereafter be passed relative to stalls and shops, whether the same be legal or illegal, or valid or invalid, and being calculated to deter persons giving such bonds from moving against illegal or invalid by-laws or regulations; and on grounds disclosed in affidavits and papers filed.

The by-law was passed on the 14th February, 1870, and the provisions complained of were as follows:—

“1. (a) That only butchers and persons occupying shops or stalls in the public markets, or in Coleman ward or Baldwin ward, for the sale of fresh meat as hereinafter provided, shall sell, or expose for sale, any fresh meat in any less quantity than by the quarter. (b) And butchers having stalls in the public market, and all persons occupying said stalls or shops in Coleman ward or Baldwin ward, for the sale of fresh meat, may sell fresh meat in any less quantity than by the quarter. (c) And butchers and all persons occupying said shops or stalls for the sale of fresh meat in Coleman ward or Baldwin ward, shall not expose fresh meat for sale or sell fresh meat in any other place in Belleville than in the market stalls and said stalls or shops in Coleman ward or Baldwin ward, except by the quarter. (d) And that no butcher or other person shall cut up or expose for sale, or sell any fresh meat in any part of Belleville, except in the stalls in the public market, or at such other places as the standing committee on public markets may appoint, not less than four hundred yards from

the public market, and within the following limits in Baldwin ward and Coleman ward, &c., [setting out the limits.]

“3. (1) That no person shall buy, sell, or offer for sale, any game, fish, poultry, eggs, butter, cheese, grain, vegetables, or fruits, exposed for sale or marketed within the town of Belleville, until the seller has paid the market fees required by by-law No. 161, or has obtained a ticket from the collector of tolls of the market of the town of Belleville, as provided for in the 27th section of by-law No. 161, and before the hour of nine o'clock in the forenoon, during the months of June, July, and August, and ten o'clock during the rest of the year. (2) No person shall forestall, regrate, or monopolize any market grain, meats, fish, fruits, roots, vegetables, poultry, and dairy products, within the town of Belleville. (3) Provided always, that before the hour of twelve o'clock, noon, no butchers' meat, fish, hay, or straw, shall be bought or sold by any person in any part of the town, except at the public market place, and in the said stalls or shops in Coleman ward and Baldwin ward, as hereinbefore mentioned; (4) and further, that before the hour of ten o'clock in the forenoon, no huckster or runner within the municipality, or within one mile of the outer limits thereof, shall purchase any meats, fish, or fruits, brought to the public market.

“4. That every person selling meat or articles of provision by retail, whether by weight, count, or measure, in the town of Belleville, shall provide himself with scales, weights, and measures for the said town; but no spring balance, spring scale, spring steelyards, or spring weighing machine, shall be used or allowed to be used for any market purpose.

“5. That any person offending against this by-law, or any of its provisions, shall, upon conviction thereof before any magistrate of the town of Belleville, be fined in a sum not less than one dollar, nor more than twenty dollars, to be levied on his, her, or their goods and chattels, and in default of such goods and chattels to be sent to the common gaol of the County of Hastings for any period not less than

two days, nor more than twenty days, which fines shall be applied to the uses of the municipality of the town of Belleville.

“6. That this by-law shall come into effect immediately after the passing thereof.

[L. S.]      (Signed)      “ALEX. ROBERTSON,  
Mayor.”

The following were the regulations in question :

“*Regulations for the Government of the Market Stalls and Meat Stalls of the Town of Belleville.*

“1. That any person or persons wishing to sell or vend fresh meat in quantities less than a quarter in a shop or stall in Coleman ward or Baldwin ward, shall, before the first day of March in each year, make application in writing to the chairman of the market committee, stating the annual sum he or she will pay in addition to the sum of forty dollars to obtain a certificate from the proper authority, authorizing the holder of the certificate to expose for sale and sell fresh meat in one stall in Coleman ward or Baldwin ward, for the term of one year from the first day of March in the year in which the certificate is obtained.

“2. The market committee shall, on the first day of March in each year, or so soon thereafter as practicable, examine the tenders which shall have been received by the chairman of the market committee, and accept any of the said tenders that said committee shall deem it advisable to accept, and shall at once notify the person or persons whose tenders have been accepted of said acceptance.

“3. The person or persons whose tender shall have been accepted shall immediately, upon being notified as above mentioned, give to the market committee the names of two responsible persons as sureties for the due performance of the conditions of the bonds hereinafter mentioned.

“4. In case the market committee deem the said sureties good and sufficient, the person or persons whose tenders shall have been so accepted shall, with said sureties, enter into a bond with the treasurer of the town conditioned for

the payment of the sums so tendered in fifty-two equal weekly payments, and to abide by all the regulations in force at the time of entering into the bond relative to the sale of fresh meat in said stalls or shops in Coleman ward or Baldwin ward, and all other by-laws and regulations which may be hereafter passed and enacted in Belleville, relative to said stalls and shops."

In this term, *Kerr* shewed cause. The by-law is not sufficiently proved. The affidavit alleged to be the proof of it is not annexed; it refers to it merely as the exhibit A. The by-law restricts the sale of meat to the market, and to two other places in Belleville. This the council had power to do: Municipal Act of 1866, sec. 296, sub-secs. 6-14: *Kelly and The City of Toronto*, 23 U. C. R. 425. The case of *Fennell and The Town of Guelph*, 24 U. C. R. 238, is not against the previous decision. The later case related to other articles being affected by the by-law than the statute gave control over. The Ontario Act, 31 Vic. ch. 30, sec. 32, amends some of the subsections of sec. 296, by extending them; and so also does the 33 Vic. ch. 26, secs. 5, 6; and both of these apply to the present by-law, which was passed on the 14th of February. The by-law No. 161, referred to in the third section of the present by-law, should have been produced, for without it it does not appear what the fee is which is complained of. A fee, by sec. 296, subsec. 15, may be imposed on vehicles in which anything is exposed for sale or marketed, and if an act may be prohibited or regulated, it may be allowed or regulated by the imposition of a fee. Sec. 296, sub-sec. 10, as re-enacted by 33 Vic. ch. 26, sec. 6, expressly allows a fee to be charged. As to the prohibition to buy or sell before 12 M., except at the public markets and in the authorized places in the other two wards, that is clearly within the powers of the council, who have power to regulate, and in some cases to prohibit altogether. As to hucksters, &c., see sec. 296, sub-sec. 12, and 31 Vic. ch. 30, sec. 32. The by-law does not say hucksters, &c., *living*

within the municipality, &c., but it must mean that. The prohibition of spring weighing machines is clearly within the power of the council. The 5th sec. of the by-law is not bad, because a discretion is left to the Justice to impose a fine within certain limits: Municipal Act of 1866, sec. 209, sec. 246, sub-secs. 6, 7, 8. As to the whole of it being made payable to the municipality, it may be read as if the moiety only should be so applied. As to costs, if part only of the by-law should be quashed, see *Patterson and The Corporation of Grey*, 18 U. C. 189.

*Harrison*, Q.C., supported the rule. The first section of the by-law, confining the sale of fresh meat to butchers and to the occupants of shops or stalls in the public market, or in Coleman ward or Baldwin ward, is bad. It is contrary to the Act of 1866, sec. 220, which prevents the council from giving any person an exclusive right of exercising any trade in the municipality. There is a great difference between prevention and regulation:—*Harrison v. Godman*, 1 Burr. 12; *Pierce v. Bartrum*, Cowp. 269; *James v. Tutney*, Cro. Car. 497; *The Master, &c., of Gunmakers v. Fell*, Willes 384; *McLean v. St. Catharines*, 27 U. C. R. 603; *Pirie and the Corporation of Dundas*, 29 U. C. R. 401. The by-law is bad, for not reserving the moiety of penalties to the informers, by the Act of 1866, sec. 211. The market regulations must be an order or resolution, under sec. 198, and may be set aside. The license or fee of \$40 imposed on the butchers or persons who get the licensed shops or stalls in Coleman and Baldwin wards are wholly unwarranted, and even if warranted they would be and are unreasonable. The provision is directly opposed to sec. 220.

WILSON, J., delivered the judgment of the Court.

It appears section 2 of the by-law was repealed on the 17th of February, unknown to the applicant, before the rule *nisi* was moved.

The fourth section requires every person selling meat or articles of provision by retail, whether by weight, count, or measure, to provide himself with weights, scales, and

measures ; and it prohibits spring scales, &c., for any market purpose.

The Consol. Stat. U. C. ch. 58, enables the councils of towns to appoint an inspector of weights and measures, who is to test, and, if correct, to stamp the same. That Act assumes (sec. 16,) that "every storekeeper, shopkeeper, miller, distiller, butcher, baker, huckster, or other trading person, and every wharfinger or forwarder," will be furnished with weights and measures ; for while the Statute enables all such weights and measures to be stamped, if required to be so by the owner, and enables the inspector (sec. 17) to "enter any shop, store, warehouse, stall, yard, or place where any commodity is bought, sold, or exchanged, weighed, exposed, or kept for sale, or weighed for conveyance or carriage," to examine the same, and (sec. 18) to forfeit them if "not stamped, or if they are light or unjust," and subjects persons having incorrect weighing machines in their possession, or who refuse to produce their weighing machines for examination, or who obstruct the inspector in his duty, to penalties ; it contains no provision making it obligatory on any of these persons to have weights or measures at all.

It is impossible, however, for such persons to be without weights and measures, "where," in the language of the Statute, "any commodity is bought, sold, or exchanged, weighed, exposed, or kept for sale, or weighed for conveyance or carriage," so that it is no great stretch of authority to say that persons selling meat or articles of provision by retail, by weight, count, or measure, shall have such weights and measures, when the council has authority to regulate the sale of so many articles, and the weighing or measuring (as the case may be) of grain, meat, vegetables, fish, hay, straw, fodder, wood, and lumber, lime, shingles, laths, cordwood, coal, and other fuel, farm produce of every description, small ware, and all other articles exposed for sale, and to impose penalties for light weight, or short count, or short measurement in anything marketed.

We do not think this an enactment in excess of the

powers of the council. Nor is there any reason to say that the prohibition of the use of spring balances, &c., is beyond their power either.

It is well known that these springs become affected by use, and by the change of temperature, so as not to remain true; and while nothing is alleged against the reasonableness of this exclusion, we should not look for difficulties to raise against the by-law.

That clause is not interfered with.

The fifth section has been impeached on two grounds: firstly, because it leaves it in the discretion of the convicting magistrate to impose a fine varying from \$1 to \$20, and imprisonment from two to twenty days, while it is said the sum and the time should have been absolutely fixed by the council; and, secondly, because the fines are to "be applied to the uses of the municipality," thus excluding the informer from his moiety under the Act of 1866, sec. 211.

The first of these objections is not tenable, for the Act of 1866, sec. 209, enables the magistrate to "award the *whole or such part* of the penalty or punishment imposed by the by-law *as he shall think fit*," a provision no doubt made in consequence of the opinion expressed in *Fennell* and *The Corporation of Guelph*, 24 U. C. R. 238.

Even if the law had not been altered, we should have declined, as the Court did in that case, to interfere with the by-law on that ground.

As to the second objection to these clauses, we think it must prevail. The moiety of the informer's share of the penalty should be preserved to him. Under the by-law as it stands, he gets no share; and it may damp the energies of a class of people who are supposed by the Legislature to be necessary, and to do good service, if the reward which stimulates them to action is taken away. That part of the fifth section must be quashed.

There remain now the 1st and 3rd sections to be considered. [The learned Judge here read the first section, dividing it into paragraphs (a), (b), (c) and (d), as at page 83, which was not done in the original.]

This long section is somewhat in the form of Acts of Parliament as they used to be drawn, having all the materials accumulated into one clause, while it consists of different cases, and each case is to have a different legal action on it.

Coode, in his very valuable work on "Legislative Expression," p. 42, says: "There can be no doubt that the more strictly each clause is limited to one class of cases, one class of legal subjects, and one class of legal actions, the better."

The first and second divisions of the section are substantially the same, the second being the complement of the first; and the question is, has the council the power to enact that only butchers and persons occupying stalls in the market, and those having the licensed shops or stalls in Coleman or Baldwin wards, shall sell or expose for sale in the municipality fresh meat in a less quantity than the quarter?

2. The next question is, has the council the power to restrict the privileged persons in the previous part of the section from selling or exposing for sale fresh meat except by the quarter in any other part of the municipality than in their said stalls or shops?

3. And thirdly, has the council the power to prevent butchers and others from cutting up, exposing for sale, or selling fresh meat in any other part of the municipality, than in the stalls in the market, or in such other places as the committee may appoint, not less than 400 yards from the market, and within certain specified limits?

As to the first question, we think, as the council has full power to regulate the *place* of selling butchers' meat, they may restrict it to the public market and to the shops or stalls provided for the purpose beyond the market. That has been expressly settled by the Court in *Kelly* and *The Corporation of Toronto*, 23 U. C. R. 425, and re-affirmed in *Fennell and the Corporation of Guelph*, 24 U. C. R. 238.

As the council may require the sale of all butchers' meat to be at such places, there can be no harm in their allowing it when it is by the quarter to be sold anywhere else.

This by-law is, in effect, a declaration that butchers' meat, less than the quarter, shall not be sold elsewhere in the municipality than at the market and specified stalls, and to that extent it is clearly maintainable.

The second question is answered by what has been said as to the first. The council has undoubtedly the power to say that those who are privileged to sell by less than the quarter at the specified places shall not be entitled to sell out of these places otherwise than by the quarter; that is, when they sell out of such places they shall be on the same footing as other persons.

The third question has also been answered by what has been said. *Kelly and the Corporation of Toronto*, 23 U. C. R. 425, is directly in point. The first section of the by-law is therefore valid.

The third section of the by-law is as follows: [The learned Judge here read sec. 3, dividing it into four parts, (1), (2), (3) and (4), as at page 84, the original being in one paragraph only.]

The 9th sub-sec. of sec. 296, Consol. Stat. U. C., ch. 51, enacts that the council shall have power to pass by-laws "for preventing or regulating the buying and selling of articles or animals exposed for sale or marketed;" and the 10th sub-section, as amended by 33 Vic., ch. 26, sec. 6, Ontario, gives power also to pass by-laws "for regulating the place and manner of selling and weighing grain, meat, vegetables, fish, hay, straw, fodder, wood, lumber, shingles, farm produce of every description, small ware, and all other articles exposed for sale; and the fees to be paid therefor."

The power to *prevent* or regulate the buying and selling of articles exposed for sale or marketed is more extensive than the Legislature could probably have intended to give, and would, if literally exercised, cover almost any enactment.

All the articles mentioned in the first part of this section of the by-law are certainly "articles" within the 9th section of sec. 296. The by-law relates to the buying

and selling of them ; so does the statute ; and the by-law says that these articles shall not be bought or sold or marketed until the seller has paid the market fees required by by-law No. 161.

The power to prevent the buying or selling of these things, and the power to regulate the buying and selling, includes, we think, the power to impose a reasonable fee for the buying, and selling, and marketing.

The 10th sub-section relates to the selling, not the buying ; but if the *seller* can be restrained from selling till he has paid the market fee, it is not a very unreasonable thing to say also that people shall not buy. There can be no sale without a purchaser ; and the fee is put on the seller, not on the buyer, and no penalty is put on either.

Now this 10th sub-section expressly provides for "the fees to be paid therefor," and it applies to a great number of articles specially named, and to "all other articles exposed for sale." The ticket of the collector, and the hour of the day, are also within the power of the council to provide for.

The first part of the by-law is valid.

The second part of the third section of the by-law repeats as to forestalling, &c., the obsolete English provisions enacted in sec. 296, sub-sec. 11, and does nothing more.

The third part of the section is also clearly within the two sub-sections already referred to.

The fourth part of the section, we think, is bad, because it prevents hucksters or runners within the town, or within a mile of it, buying certain things brought to the market till after ten in the morning ; that is, it prevents *the buying* in the town, or within a mile of it, while the Statute authorizes the preventing those only *who live* within the town, or within a mile of it, from buying in the town : *McLean and The Corporation of St. Catharines*, 27 U. C. R. 603.

That branch of the third section must be quashed. The rest appears to be valid.

It may be a matter for consideration in re-enacting this clause as to hucksters, butchers, and runners, notwith-

standing the generality of the 12th sub-sec. of the Statute, whether the by-law should not be so worded as not to exclude those persons from buying for their own use or the use of the family for consumption, or when not to be resold. See the section so modified in 24 U. C. R. 238.

The section of the market regulations which has been objected to is as follows: "That any person wishing to sell fresh meat in quantities less than a quarter in a shop or stall in Coleman or in Baldwin wards, shall, before the first of March in each year, apply in writing to the chairman of the market committee, stating the annual sum he or she will pay, in addition to the sum of \$40, to obtain a certificate from the proper authority authorizing the holder of the certificate to expose for sale and sell fresh meat in one stall in Coleman ward, or in Baldwin ward, for one year from the 1st of March of the year in which the certificate is obtained."

This provision is certainly bad by the general law, and is directly against the 220th section.

The portion of it contained in section 4, as to the person who may get the certificate giving a bond with sureties to obey the by-laws relative to the sale of fresh meat, and to stalls and shops where the same is sold, we do not think to be objectionable. It applies, of course, to valid by-laws, and does not bind the obligor to the observance of anything illegal; nor is it contrary to public policy, in hampering the free action of a member of the municipality from moving against any corporate abuse, usurpation, or illegality.

There is a question of much importance as to these regulations, whether they can be moved against as an order or resolution of the council, under sec. 198 of the Act of 1866.

It appears to us these regulations are within the meaning of these terms. They are operative, and they are so by reason of their being the order of the council.

The clause we have adverted to, and which has been complained of, is not a mere matter of detail, and of mar-

ket or police routine. It is a serious order and direction, that every applicant for authority to sell fresh meat in the two named wards shall specify the amount of fee he is willing to pay for the license he asks for; and if this be not an order or resolution, it is difficult to say what can be one.

The affidavits shew these regulations were reported to and received and adopted by the council.

Without for a moment entertaining the idea that market regulations can generally be moved against, and that this Court is to revise them on motion or otherwise, we nevertheless feel that to the extent already alluded to in this case they may and can properly be quashed.

We have not considered it necessary to say anything of the reasonableness or unreasonableness of the by-law in confining the sale of fresh meat to the market and to the two specified places in the other wards, because there is contradictory evidence on the subject which cannot well be reconciled, and because the municipal council, the most popular representative body in the country, is undoubtedly the best and the safest judge as to what will meet the public wants of the community in that respect. It is especially a local and a popular question, and can generally be best settled where these special influences have the most weight.

We see nothing in this case which leads us to think that any injustice has been done by the council to Mr. Snell or to any one else, nor anything which satisfies us why the council has declined to entertain and give effect to the application of Mr. Snell, which was so largely signed and so respectably supported, and about which there has certainly been some degree of public irritation felt.

It is impossible to interfere on the ground of the present arrangement being unreasonable. It does not seem to be so. It is simply a matter of local reform and agitation, to be redressed by local means.

The result is, that the rule as to the by-law will be discharged so far as relates to the first and second sections, the

second section having been repealed before the rule was moved for; the 3rd section, excepting the latter portion of it, relating to hucksters and runners; the 4th section; and the 5th section, excepting that part of it relating to the application of the penalties;—and that the rule as to the regulations will be discharged, excepting as to that part of the first section which requires the payment of any sum of money to obtain a certificate authorizing the holder of it to sell fresh meat in Coleman or in Baldwin wards, in Belleville, with costs to be paid by the applicant as to such parts of the rule and application as he has failed to sustain. And that the rule will be absolute setting aside or quashing the said by-law as to that part of the third section which relates to hucksters and runners; and as to that part of the fifth section which relates to the application of the penalties; and as to that part of the said regulations which requires the payment of any sum of money for obtaining a certificate to authorize the holder of it to sell fresh meat in Coleman or in Baldwin wards in Belleville, with costs to be paid by the municipal corporation as to such part of the rule and application as the applicant has maintained.

*Rule accordingly.*

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### MCKAY V. BAMBERGER ET AL.

*Sale for taxes—Lands in cities—C. S. U. C. ch. 55.*

Under Consol. Stat. U. C., ch. 55, the chamberlain and high bailiff in cities had power only to sell the lands of *non-residents* for arrears of taxes.

A sale in 1865, of land belonging and assessed to a resident, was therefore held invalid.

TRESPASS to land situate in the city of Hamilton.

Pleas.—Not guilty; and land not the plaintiff's. Issue.

The cause was tried at Hamilton in the fall of 1868, before the late Mr. Justice John Wilson.

The plaintiff claimed under a deed, dated 30th November, 1865, from James McCracken, high bailiff of Hamilton, to the plaintiff, as purchaser of the land in question for arrears of taxes.

The warrant to the high bailiff to sell, granted by the city chamberlain, was dated the 29th of July, 1865.

A verdict having been found for defendants,

In Michaelmas Term, 1868, *John Read* obtained a rule *nisi* for a new trial.

A question arose as to the sufficiency of the description of the land sold, but this part of the case is omitted, as the judgment proceeds upon another point.

In this term, *Fenton* shewed cause. The sale for taxes was made in 1865, under Consol. Stat. U. C., ch. 55. The chamberlain and high bailiff of Hamilton had no power to make a sale for taxes of the land in question, for they could only act as to the lands of non-residents, and this land was not of that class: sec. 168. By the Act of 1866 such officers have more authority in these respects than they had before it.

*M. O'Reilly*, Q.C., supported the rule. By Consol. Stat. U. C., ch. 55, sec. 168, the chamberlain and high bailiff of cities have the like powers as the treasurer and sheriff of counties have in counties. If the powers of chamberlains and high bailiffs be restricted to the sale of non-resident lands, the question then is, what are non-resident lands. Are they not unoccupied lands, or lands not resided upon? See secs. 6, 19, 22, 23, 168, 177, 179, 180, 183, 185. The Statute contemplated all lands of the like nature which could be sold in counties being sold in cities.

WILSON, J., delivered the judgment of the Court.

It was contended the sale by the chamberlain and high bailiff was illegal, for that they were enabled by the Consol. Stat. U. C., ch. 55, sec. 168, only to fund, collect, and manage the taxes due to their cities on the lands of non-residents, and not to sell the lands of residents at all.

Section 75 of the Act of 1853, which is the one consolidated by section 168 referred to, shews this more plainly than the one which was substituted for it. The *collecting* would authorize the sale by the city of the non-resident land, which, as well as other lands, counties may sell.

This lot in question was not non-resident land. Both occupant and owner were assessed for it, and both of them resided in Hamilton. The city could not, in 1865, sell this land, under the Consol. Stat. U. C., ch. 55. By the Act of 1866, 29-30 Vic. ch. 53, sec. 172, cities have the like general powers in selling land for arrears of taxes, whether on resident or on non-resident lands, which counties have; but this sale was made before that Act was passed, and at a time when cities had not such a power.

The rule will be discharged.

*Rule discharged.*

## FITZGERALD V. THE GORE DISTRICT MUTUAL FIRE INSURANCE COMPANY.

*Mutual Ins. Co.—Mortgage—Assignment of policy—"Person insured"—Proof of loss.*

The plaintiff, owning property, insured it with a mutual insurance company on the 1st December, 1864, for three years. He mortgaged it to one N., and on the 13th May, 1865, assigned to him the policy. N. paid up all arrears of assessments, but gave no note or security for the amount unpaid. The defendants assented to the assignment on the 13th December following. The property was burned on the 2nd July, 1867. The notice of loss was given and the requisite affidavits made by N. His mortgage was paid off in 1868, and in March following the plaintiff sued on the policy. One of the conditions endorsed was, that all persons insured and sustaining loss should forthwith give notice, and within thirty days deliver a particular account of such loss, signed by them, and verified by their oath.

*Held*, that the action could not be maintained. Per *Morrison, J.*, N. was not the person insured, and therefore could not give the notice of loss. Per *Wilson, J.*, he was insured, and could have sued in his own name, but the contract of insurance having been absolutely transferred to him, the plaintiff could not sue.

ACTION on a fire policy under seal. The declaration set out the policy and the loss in the usual manner. It then averred that at the time of the loss, and for more than thirty days thereafter, one Newton was the holder of the

policy under and by virtue of a deed of assignment thereof, made by the said plaintiff with the assent in writing of the defendants, which assignment was made to secure the said Newton as mortgagee of the said insured premises for an amount equal to the sum insured by the policy, with the knowledge and consent of the defendants; and that Newton, being the insured as aforesaid, and interested in the insured premises, &c., made due proof of the said loss under the terms and conditions of the policy, and the defendants accepted the same as complete and satisfactory proof of loss. And the plaintiff averred that after the time for proving such loss had elapsed, and before the commencement of this suit, he paid off the said mortgage to the said Newton, and procured the same to be duly discharged, and obtained a re-assignment of the policy, of all which the defendants had notice.

Pleas—2. That the policy was made subject to certain conditions, one of which provided that all persons insured by the defendants sustaining loss, &c., should forthwith give notice thereof to the secretary of the defendants, and within thirty days after such loss deliver a particular account of such loss, signed with their own hands, and verified by their oath, and that until such proof, and certain others in said conditions set forth, should be produced, the loss should not be payable: that the said Newton has not, nor has the plaintiff, delivered a particular account of said loss signed with his own hand, and verified by his oath, in accordance with the terms of said condition. And the defendants say, that the said Newton was not the insured within the meaning of the terms and conditions of the policy, and that he did not, nor could he, make due proof of said loss under the terms of the said conditions. And the said defendants say that they did not accept the alleged proof made by Newton as complete and satisfactory proof of loss under said policy.

The third plea set out that defendants were a mutual insurance company, &c., governed by the Statute respecting mutual insurance companies: that Newton never gave

any security to the satisfaction of the directors of the company for that portion of the deposit or premium note made by the plaintiff to the defendants prior to the issuing of the policy, and on the faith whereof the policy was issued, remaining unpaid at the time of the assignment of the policy, &c., which unpaid portion then amounted to, to wit, \$130; and that Newton did not apply to the directors to have the policy, by the consent of the directors, ratified and confirmed to him for his own benefit as alienee of the property insured: that the consent of the defendants to said assignment was given solely with a view of preventing the policy given becoming void under the terms thereof; and it further averred that at the time of giving such consent, and until after the loss, the defendants were not aware that Newton was the mortgagee of the insured premises; and defendants say that by reason of the premises Newton was not the insured within the meaning of the policy and conditions. The plea also set out the condition as set out in the last plea, as to notice of loss, &c., and the delivery of a particular account thereof, &c., within thirty days, signed by the insured, and verified by his oath, and that Newton did not deliver such particular account signed by the plaintiff, &c.

Upon the fourth and fifth pleas nothing arose.

Issues were joined on these pleas, and the case was tried before Hagarty, C.J.C.P., at the last fall assizes at Hamilton.

On the trial it appeared that the policy was effected on the 1st December, 1864, for three years, ending on the 1st December, 1867, for \$1,000, on a building and barn of the plaintiff, the plaintiff giving a premium note for \$140: that on the 13th May, 1865, the plaintiff, by deed, mortgaged the premises to one Newton, for \$1,000: that on the 13th December, 1865, the consent of the directors, endorsed on the policy, was obtained by the plaintiff, authorizing him to transfer his interest in the policy to Newton, there being on the back of the policy an assignment from the plaintiff to Newton of the policy, and all sums of money to arise by virtue thereof, dated 29th November, 1865:

that on the 2nd July, 1867, the premises were consumed by fire. It appeared also that Newton's mortgage was paid off on the 22nd January, 1868. This action was commenced on the 17th March, 1868.

On the trial, Newton was called by the plaintiff, and he proved that at the time of the assignment of the policy there was \$34.58 due for assessments, which he paid in order to get the policy transferred. This amount he charged to the plaintiff; he never looked after any further assessments. It appeared also, that Newton was tenant of the plaintiff of the premises: that after the fire he, Newton, notified the defendants' agent of the loss, and that he got blanks to fill up to prove the claim: that he swore to the loss according to the forms, and delivered it to the office of the defendants' secretary in Galt, one Cunningham being with him.

Cunningham was called, who stated he went with Newton to the defendants' secretary, when they were told they must make affidavits and obtain a certificate from the nearest justice of the peace. The witness said two affidavits were made by Newton, the first being served on the 15th July at the office. He said that no objection was made to the form of the papers, and the second affidavit was made as it should be served on the president or secretary. The second paper was served on the 23rd July.

The first affidavit or proof of loss was made on the 13th July, in which Newton swore that on the 2nd July, 1867, a fire broke out in the premises, describing them, occupied by himself as tenant to the plaintiff, and insured under policy 10749: that the value of the property was \$3,000, and that the fire caused damage to the amount of \$3,000: that he, Newton, was the occupant, and that he believed that the plaintiff was the absolute owner thereof: that at the time of the fire he was not aware of any other insurance on the premises, and that he did not know the origin of the fire. The second proof of loss was Newton's affidavit sworn to on the 19th July, containing similar statements to the first, except that he valued the property at \$1,500,

and the loss at that amount; and at the end he further stated that at the time of the fire he was interested in the buildings as mortgagee for his own benefit for the sum of \$1,000, and interest at ten per cent. from 30th May, 1865. That was all the proof of loss adduced.

The plaintiff's case being closed, the defendants' counsel objected that the plaintiff failed: that no affidavit of the assured, the plaintiff, was delivered: that Newton was not the assured: that none but members can be insurers, who must give a premium note to constitute them members.

It was then agreed, as there was nothing for the jury, that a nonsuit should be entered, with leave to the plaintiff to move to enter a verdict for him for the amount claimed, \$1,090, if the Court should be of opinion he was entitled to recover, it being clear that Newton gave no premium note, nor did the plaintiff make any affidavit.

In Easter Term, 1869, *Moss* obtained a rule *nisi* to enter a verdict for the plaintiff, according to the leave reserved.

In Michaelmas Term following, *Miller* shewed cause, citing *Cameron v. Monarch Assurance Co.*, 7 C. P. 212; *Kreutz v. Niagara District Mutual Insurance Co.*, 16 C. P. 131; *Scott v. Niagara District Mutual Insurance Co.*, 25 U. C. R. 119; *Lampkin v. Western Assurance Co.*, 13 U. C. R. 237; *Livingstone v. Western Assurance Co.*, 14 Grant 461.

*Moss* supported the rule, citing *Hotham v. East India Co.*, 1 T. R. 638; *Brady v. Western Assurance Co.*, 17 C. P. 597; *Smith v. Provincial Insurance Co.*, 18 C. P. 223; *Smith v. Royal Insurance Co.*, 27 U. C. R. 54; *Albert v. Grosvenor Investment Co.*, L. R. 3 Q. B. 123; *Cort v. Ambergate, &c., R. W. Co.*, 17 Q. B. 137.

MORRISON, J.—The condition of the policy is, that all persons insured by the company and sustaining loss, &c., are forthwith to give notice thereof to the secretary, and within thirty days after said loss to deliver a particular account of such loss, signed with their own hands, and verified by their oath, &c., and until such proofs, declaration,

&c., are produced, the loss shall not be payable. Now the plaintiff, the person insured by the policy, did not give such notice or particular account; but the plaintiff relies on the fact, as being equivalent to a compliance with this condition, that one Newton, who was a mortgagee of the insured premises at the time of the fire, and an assignee of the policy with the consent of the defendants, made and delivered the affidavit of proof; and the plaintiff contends that such proof was sufficient to enable him to recover: in other words, dispensed with any further proof being made, and is available in this action brought by and for the benefit of the plaintiff.

Assuming that such proof under any circumstances could be a compliance with the terms of the condition, it could only be upon the supposition that Newton, the assignee, was the insured. Now the defendants are a mutual insurance company, established under the authority of the statutes which governs such companies, and the policy recites that the plaintiff having become a member of the defendants' company, the plaintiff bound himself to pay all such sums of money as may be assessed by the directors pursuant to the Act incorporating the company, passed April 20th, 1836 (6 Wm. IV., ch. 18), consolidated as Consol. Stat. U. C. ch. 52, and also secured to the company his premium note for \$140, &c., *the plaintiff is insured in and by the said company*, &c., and the members of the company therefore promised, according to the provisions of the said Act, to settle and pay unto the plaintiff, &c., all losses, &c., not exceeding \$1,000, &c.; and the policy provides that the interest of the assured (the plaintiff) in the policy was not assignable without the consent of the company in writing.

Now the principle upon which these mutual companies are based is, that the insured insure each other, and before a person can become insured he must be a member of the company; and the question is, whether Newton was a member of the company, and a person insured by this policy. Sec. 7, Consol. Stat. U. C. ch. 52, defines who are members of the Company, viz., those who qualified them-

selves by signing their names in the original subscription book, and all other persons thereafter becoming members of the company by effecting insurances therein, &c.; and by the 10th section the company, by its name, may mutually insure the houses, &c., of the *members* thereof, &c.; and by the 21st section every person who becomes a member by effecting insurances therein shall, before he receives his policy, deposit his promissory note, &c., for such a sum of money as the directors shall determine; and by the 66th section every member of the company shall pay his proportion of all losses and expenses, &c. The 67th section provides for a lien on the estate of the assured at the time of the assurance, and the company may sell the same to meet the liability of the assured, &c.; and by the 68th section, in case of any loss, &c., happening to any member upon property insured, such member shall give notice thereof in writing to the board, &c., or secretary, within thirty days after such loss, &c.

There are several other sections in the Act indicating who are the members and their liabilities. It appears to me that Newton was not a member of the company, and never was the assured under the Act, or within the terms or meaning of the policy. His position is that of an assignee of the policy, assigning to him the money which thereafter might arise or be had by virtue thereof, which assignment he got as collateral security for the repayment of a mortgage debt. He gives no premium note as a member, pays no assessment, and is under no liability to the defendants, and there is no contract made or existing between them and him. He is merely by the assignment entitled to receive, as between the plaintiff and himself, in the event of any loss, any moneys the plaintiff may be entitled to receive under the policy; but the policy or its terms are in no wise changed. The assignment is made, and taken, and consented to, subject to all its conditions, one of which conditions is, that the person named therein, the assured, shall, under his hand and verified by his oath, make proof of any loss, and its extent, &c. The mere

assignment does not dispense with the performance of that condition. The plaintiff is the person insured; should any loss occur he obtains the benefit and the money which is paid to or for him. The money may never pass to the assignee, for his debt may be otherwise paid, as in this very case, before the commencement of this action.

If the plaintiff's contention is right, it seems to me that we should have to hold, in effect, that an assignment of a policy *per se* varies the conditions of the policy, and in this instance engrafts on it another condition, dispensing with notice and proof of loss being made by the assured, and adding a new stipulation or condition in lieu thereof, viz: that it might be given and made by the assignee. No authority was adduced in support of that view.

The manner in which the plaintiff declares and sets out the assignment, and the giving notice and making the statement, &c., by the assignee, is predicated upon the grounds that Newton was the insured, and could have brought an action in his own name if he was at all interested in the moneys arising from the policy; but it seems to me that the mere assignment of the policy did not give to Newton a right of action in his own name. If he had as mortgagee the assignment of the policy ratified under the 30th section of the Act, and given proper security for the payment of the portion of the premium note remaining unpaid, *i.e.*, become a member of the company, as in *Burton v. These defendants*, 14 U. C. R. 342, or as in the case of *Kreutz v. The Niagara District Insurance Co*, 16 C. P. 131, then he could have done so, but the mere assignment as here gave no right of action to Newton in his own name, and if he had brought an action in the name of the plaintiff for his own benefit, he would be subject to all the defences which the defendants could make against the plaintiff. The insured can make no transfer which would operate against the company, or deprive it of any conditions or safeguards contained in their policy; but this action is not brought for the assignee, or for his benefit, as by the declaration it appears he has no interest, as he reas-

signed the policy before this action, being paid the amount of his mortgage debt. The plaintiff brings this action as the assured, and for his own benefit, and he claims to be exempt or exonerated from the performance of a condition precedent, which he stipulated to be performed by himself. He must therefore shew either an excuse for the non-performance or a discharge from any obligation to perform it. I think he has failed to do either. The alleged performance by another person of the personal act required by the policy to be done by the plaintiff, is not a compliance with the terms of the condition, nor does it form any excuse for non-performance by the plaintiff. This assignee, Newton, had an insurable interest, and which if, instead of taking an assignment as security for, he had insured such interest with these defendants by becoming a member and obtaining a policy, it could hardly be contended that any proof he put in under his policy respecting his interest would have availed the plaintiff in an action on his policy, or *vice versa*. I see very little difference in principle between that case and what the plaintiff contends for here.

On the whole, I am of opinion that the nonsuit was right, and that this rule should be discharged.

WILSON, J.—Fitzgerald was the owner of the property insured, and the person who insured it on the 1st December, 1864.

He made a mortgage of the property to one Newton, and assigned to him the policy of insurance on the 13th May, 1865; and the defendants assented to the assignment of the policy on the 13th of December, 1865. The fire was on the 2nd July, 1867. Newton was paid his mortgage debt by the plaintiff on the 22nd January, 1868. The action was commenced on the 17th March, 1868. Newton gave the notice of loss and made the affidavit which accompanied it.

The defendants contend that Newton was not a person insured by the defendants sustaining loss, and therefore that his notice and affidavit were of no avail.

By the Mutual Insurance Act, as amended by the 27-28

Vic. ch. 38, alienations, under sec. 30, do not now avoid the policy; they are voidable only, and the defendants have not elected to avoid the policy, so nothing can turn on the fact of alienation.

The defendants assented in fact to the assignment of the policy to Newton; that entitled Newton to bring the action in his own name under that section.

It is said that as the Statute declares that "the alienee may have the policy assigned to him, and upon application to the directors such alienee, on giving proper security to their satisfaction for such portion of the deposit or premium note as remains unpaid, and with their consent within thirty days after such alienation, may have the policy ratified and confirmed to him for his own use and benefit, and by such ratification and confirmation the party causing the same shall be entitled to all the rights and privileges, and be subject to all the liabilities to which the original party insured was entitled and subjected"—that Newton was not a person insured, because he had not given proper security to the satisfaction of the directors for the portion of the premium note which was unpaid at the time of the assignment, although he had procured the assignment to be ratified and confirmed to him by the defendants.

In section 21, it is said that every person who becomes a member shall, before he receives his policy, deposit his promissory note for such sum as shall be determined by the board. It does not say he shall not be a member until he does so, nor that he shall not until doing so be insured, but merely that he shall not receive his policy.

If the Company choose to give out the policy before receiving the note, can it be said that the person would not be insured, though he paid premiums and continued to pay them upon his policy?

So if, under section 30, they choose to allow the assignment without requiring security for the portion of the premium note remaining unpaid from the assignee, can it be said the assignee was not insured?

Newton in fact did pay all the arrears of assessments upon the note at the time of the assignment, as the condi-

tion on which he got it. I think the Company may give out the policy to the original member, and may sanction the assignment of it to the substituted member, without requiring the note in the one case, or the security for the amount unpaid on it by the previous member in the other case, to be given. It may be irregular to do so, but I do not think the policy or the assignment of it will be void on that account.

An assessment may be made, I think, although no new note or security in its place has been given.

It appears to me therefore that Newton was a person who at the time of the loss was insured by the defendants, and was entitled to all the rights and liabilities of the plaintiff, the original party insured, and could have brought this action in his own name.

Whenever the assignee of the mutual policy can sue in his own name, the assignor, having had his premium note cancelled, and his place completely taken by the assignee, can probably no longer sue upon the policy, though his name remains on it as the person with whom the primary contract was made.

Whether some arrangement might not at the time of the transfer be made between the parties, with the assent of the company, by which the absolute assignment which the company can permit might be made in a conditional or modified form, so that the assignor, though he had transferred, might nevertheless sue, or either party in whole, for the interests of the two, might sue, or each party for his own particular interest might sue, has not yet been settled.

I think this plaintiff on the facts appearing cannot sue, the contract having been absolutely transferred to Newton.

But I am of opinion Newton was the insured, and that he was the proper person to give the notice. That is the only question that was argued, and which we were asked to determine.

RICHARDS, C. J., not having heard the argument, took no part in the judgment.

*Rule discharged.*

## HENDRICKSON v. THE QUEEN INSURANCE CO.

*Insurance—Assignment of policy—Evidence of assent by company—Second insurance—Proof of notice.*

In an action on a fire policy, issued to the plaintiff, the declaration alleged an assignment of the policy and of the property insured to one M., and by M. to B. & P., with the assent of defendants, before the loss, and that the plaintiff sued as trustee for B. & P. The second plea denied the assignment to B. & P., and defendants' assent thereto. The third plea set out a condition that notice of any other insurance should be given, so that a memorandum thereof might be endorsed on the policy, otherwise the policy should be void; and alleged another insurance effected by B. & P., without notice given or endorsed. To this the plaintiff replied that notice of such insurance was duly given to defendants.

As to the second plea, it appeared that the assignment to M. had been assented to by A., a sub-agent, at Oil Springs, of P., the defendants' agent at Sarnia (defendants' head office being at Montreal); and a memorandum was also endorsed by P. that the loss, if any, should be paid to M. only. A. had effected the insurance with the plaintiff, and he swore that he was aware of the intended assignment by M. to B. & P., and drew it out, after speaking of it to C., defendants' inspector, who told him to use the same form as in the assignment to M.: that B. & P. purchased the property, which was then kept by the plaintiff as a temperance house, it being part of the bargain that the policy should be assigned, though the assignment was not completed for some months after the conveyance of the property. B. & P. opened a bar, for which an extra premium was charged by the company, and paid through A. to P. and by P. to the head office.

*Held, Morrison, J.*, dissenting, that there was evidence of assent by the defendants to the assignment to B. & P., so as to sustain a verdict for the plaintiff on this plea.

As to the third plea, another insurance was proved, effected by B. & P., after the assignment to them, with another company. There was contradictory evidence as to whether any notice of this was given, but it was, at all events, only a verbal notice given to P., and not endorsed on the policy, which was not produced at the time. *Held, Richards, C.J.*, dissenting, that this could not support the plea, for such a notice should have been given to the company, or to some officer who had power to act upon it by cancelling the policy, which P. was not shewn to have had.

ACTION on a fire policy under seal. The declaration stated an insurance to the plaintiff of \$3,500 on a house, \$1,300 on furniture, and \$200 on a stable; and that while it was in force he assigned and conveyed the properties so insured to one Morris, and the policy was then, with the consent of the defendants, assigned by the plaintiff to Morris: that Morris afterwards, while the policy was in force, assigned and conveyed the same properties to Batchelder and Pettingell, and the policy and the interest of Morris therein were

duly assigned by Morris to them, and the defendants then assented to and accepted the last mentioned assignment of policy: that Batchelder and Pettingell continued interested in the properties insured from the time of assignment to them till the loss by fire; and the plaintiff sues as trustee for them. Averment of loss by fire.

Pleas.—1. That the policy is not the deed of defendants.

2. That Morris did not duly assign the policy to Batchelder and Pettingell, nor did the defendants assent to and accept the assignment of the policy as alleged.

3. That the policy was subject to a condition, that persons insuring with defendants should give notice of any other insurance already made or afterwards made elsewhere on the same property, so that a memorandum of such other insurance might be endorsed on the policy effected with defendants, otherwise the policy should be void; and that Batchelder and Pettingell did, after the conveyance and assignment to them of the property and policy mentioned, and before the loss, cause another and further policy to be effected by and with another insurance company, to wit, the British America Assurance Company, upon the same property insured by the policy in the declaration mentioned, for a large sum, to wit, \$2,500; and neither Batchelder nor Pettingell, nor the plaintiff, gave notice of such last insurance to defendants, nor was the same endorsed on the policy in the declaration mentioned, although a reasonable time had elapsed between the time of effecting the last mentioned insurance and the time of the loss by fire, whereby the policy in the declaration mentioned became void.

Issue was joined on these pleas.

The plaintiff also replied specially to the third plea, that Batchelder and Pettingell did, within a reasonable time, give notice to defendants of said alleged other and further insurance. Issue.

The cause was tried three times, the first time before Draper, C. J., when a verdict was found for the plaintiff, with \$2,000 damages; the second time before Morrison, J.,

when the plaintiff was nonsuited; and the third time before Hagarty, C. J. C. P., at Sarnia, at the last fall assizes, when a verdict was found for the plaintiff for \$5,623.

The evidence at the last trial, as set out at length in the judgment of Mr. Justice Wilson, was as follows:—

“The policy was admitted, and the assignment of it to Morris, dated 21st December, 1865, and memorandum of assent thereto by George Adamson, as agent of defendants at Oil Springs, given on the 27th November, 1865; and memorandum, also of the same date, signed by Poussett, as agent of the defendants at Sarnia, that if a loss should happen the amount of it was to be payable only to Morris, the assignee.”

*George Adamson*, sworn, said: “I live at Oil Springs. I was defendants’ agent there. I effected the insurance with the plaintiff. I was aware of the intended assignment by Morris to Batchelder and Pettingell. The plaintiff kept the premises as a temperance house. He was related to Morris. The plaintiff got Batchelder and Pettingell to purchase. I was consulted as to the assignment to Batchelder and Pettingell. I spoke to Campbell, the defendants’ inspector. He told me to take the same form as endorsed on the policy and as used on the former assignment. I drew up the assignment produced. I believe it is signed by Morris. Campbell came to examine the policies I had effected. I told him of this, and of the proposed assignment from Morris to Batchelder and Pettingell. [It was objected that what Campbell said as to notice to the company should not be received. The learned Chief Justice allowed it.] The house was first a temperance house. Batchelder and Pettingell commenced keeping a bar in it. Campbell told me the premium must be increased, and it was increased. I knew that in the bargain the policy was to be assigned to Batchelder and Pettingell. I look at a deed. It is signed by Morris. It is dated 21st December, 1865, conveying premises to Batchelder and Pettingell. I think the extra premium was paid through me by Batchelder and Pettingell. The receipt is dated 16th March, 1866; it is

signed by Poussett, agent of defendants for the County of Lambton; it is for \$21, paid by Batchelder and Pettingell. The receipt on the back of the policy, dated, 5th July, 1866, is signed by Poussett as agent. It is for \$25, received by him from Batchelder and Pettingell for extra premium on the policy, as ordered by the inspector. The premises were burned about the 13th of September, 1866. The loss was greater than the insurance: property was then very high. The letter of the 19th July, 1866, is in Poussett's writing; it is an account between him and the defendants. He charges himself with the \$25. [This was objected to as not being in the form prescribed by the policy.] I paid the money to Poussett."

In cross-examination he said: "I received my appointment from Poussett. I was sub-agent to him. The inspector came round and communicated with me; he would look at the company's risks. The premium for a temperance house is less than for a liquor tavern. Plaintiff kept it some months. I believe the plaintiff borrowed money from Morris, and the policy was assigned to him in security. I wrote to Poussett as to the transfer to Morris; the Company had cognizance of this. Batchelder and Pettingell came to this country and were here when the transfer was made. Morris was not here when the transfer was made by him; he had left. I drew up the assignment from him; did not date it. I ceased to be agent a short time after the fire. The assignment of policy to Batchelder and Pettingell was dated 25th April, 1866. I had it in my possession executed long before the fire."

*McKenzie Forbes* said: "I am secretary and general agent at Montreal for defendants. I am the principal man in this country. The letter of Poussett of the 2nd May, 1866, was received at the head office. It stated, 'The parties owning the Oil Springs Exchange have deposited \$20 with me, to be endorsed as the extra rate on the policy as soon as they can get possession of it.' The account from Mr. Poussett dated 19th July, 1866, was received at the head office. It states, 'Batchelor's premium or Hendrickson's \$25.' The money order spoken of in it we no doubt

received. The letter of the 9th May, 1866, signed by Mr. Fisher was sent to Poussett. Fisher is the defendants' accountant at Montreal; it states, 'About the middle of January last our inspector, Mr. Campbell, arranged that on account of the increased risk under policy 95,511, Oil Springs Exchange, the rate should be advanced to 5 per cent. The extra premium to be paid should therefore be \$37.50, or three-fourths of \$50.' Campbell was inspector of our company. I send him. This case is defended because there was a great suspicion of arson."

On cross-examination he said: "The inspector's duty is to view the properties insured and report to me. The extra premium was for the extra risk of a tavern. Receiving the extra premium would be no notice of assignment of policy. We had no notice whatever of the assignment. These writings would not inform us of the assignment. We required our agent to send a more regular account, which I produce. It is not the business of a sub-agent to consent to assignments. Poussett seems to have done so. The head office did not assent to the assignment. Poussett had no authority to assent to assignment; he should send it to the head office."

On a re-examination he said: "Campbell did not communicate the change to us. I took it for granted it was still Hendrickson's insurance. I did not enquire. I imagined Batchelder might be the plaintiff's agent. Campbell directed the premium to be increased; he never told me of this change."

The plaintiff claimed as loss \$4800, and for interest \$823, in all \$5623.

The counsel for defendants objected that the plaintiff, though he might sue for Morris, his direct assignee, could not sue for Batchelder and Pettingell, there was no privity between them: that the evidence shewed the loss was payable to Morris only; it was part of the original contract, and could not be assigned: that there was no evidence of assent by defendants to the transfer to Batchelder and Pettingell, and that the property in the insured premises

was shewn to have been out of the plaintiff and of Morris at the time Morris assigned the policy to Batchelder and Pettingell.

The learned Chief Justice reserved leave to defendants to move to enter a nonsuit on these grounds.

For the defence *Richard Wilkins* said: "I am senior clerk of British America Insurance Company at Toronto. Application was made on the 10th June, 1866, by Batchelder and Pettingell to effect insurance. The policy was granted of same date; interim receipt of same date.

Insured on building .....	\$1,000
"        furniture.....	750
"        on spirits and bar fixtures	750
<hr/>	
Total .....	\$2,500

I sent up the day after the fire. We did not then know of previous insurance; our agent afterwards told us of it."

In cross-examination he said: "Thomas was then our agent. This is his receipt, dated 6th July, 1866: it is for \$87.50, premium on \$2500 paid by Batchelder and Pettingell. The application was received by us on the 28th August, 1866. We compromised with Batchelder and Pettingell by paying them two-thirds. We compromised in consequence of what Thomas told us. We should not have insured if we had known of the previous insurance."

In reply *Eugene Pettingell* said: "I lived at Oil Springs in 1866. Some time about 10th July, 1866, I came to Sarnia with Batchelder. We saw Poussett. Batchelder told him he had insured in the British America Company the same premises for \$2500. Poussett made some reply: I don't remember what it was." In cross-examination he said: "Batchelder came in expressly for that purpose. I came with him. I believe Adamson was then at the Springs. I did not see the policy. I don't think I said on my first examination Batchelder took Poussett aside. I am over nineteen. I gave evidence over two years ago on the first trial. Nothing was said by either party as to

having it endorsed on the policy. I saw no policy or papers produced."

Defendants' counsel objected that this notice was not sufficient, the policy should have been produced to have had a memorandum endorsed on it, and it should have been given by the plaintiff or by Morris.

Leave was reserved to the defendants to move on this point also.

*Henry Poussett*, for the defendants, in rejoinder, said: "I was agent of defendants. I have no recollection of any notice being given to me of the second insurance. At the time of the fire I was not aware of the second insurance, and of course did not communicate it to the head office. I think *Pettingell* said at the first trial that I went with *Batchelder* to the back of my shop aside, when *Batchelder* told me of this. I received the additional premium in July of \$20 from *Batchelder*; he was then alone. Before that *Campbell* had called my attention to the fact that he thought there was enough insured on the building, so that if I had heard that there was a further insurance of \$2500 it would have attracted my attention. I had heard *Batchelder* and *Pettingell* had purchased the property. *Campbell* told me he had instructed them to pay me an extra premium. When *Batchelder* paid the extra premium he said they had not got possession of the premises yet. On the 5th July I endorsed the extra premium on the policy. I sent down the account produced with the balance of money due by me. I also gave the defendants the second account produced."

The learned Chief Justice here noted as follows: "Subject to the leave reserved, I leave it to the jury to say, as a matter of fact, whether, as in the second plea alleged, the defendants did assent to and accept the assignment to *Batchelder* and *Pettingell* on the whole facts of the case. As to the third plea, notice to the defendants is in issue, and I leave it the jury. My present impression is against the sufficiency of such a notice under the condition as worded; there was no production of the policy or anything

done by Batchelder and Pettingell to get the consent endorsed on the contract in their possession; but it goes to the jury as pleaded. Defendants' counsel renew the legal objections to my charge."

The jury found both issues for the plaintiff, damages \$5623.

In Michaelmas Term last *Anderson* obtained a rule calling on the plaintiff to shew cause why the verdict should not be set aside, and a nonsuit entered, pursuant to leave reserved, on the following grounds:—

1. There was no privity between Batchelder and Pettingell and the plaintiff, to entitle the plaintiff to sue as trustee for them.

2. There was no evidence to go to the jury of any assent of the defendants to the assignment of the policy from Morris to Batchelder and Pettingell.

3. The assignment to Batchelder and Pettingell conferred no right at law or in equity on Batchelder and Pettingell to the policy or the insurance money, as Morris had parted with the premises insured before he assigned the policy to Batchelder and Pettingell, and the policy was therefore at an end.

4. There was no evidence to go to the jury of any notice to defendants of the further insurance made by Batchelder and Pettingell.

Or to shew cause why a new trial should not be had, on the ground of misdirection of the learned Chief Justice, in holding that there was evidence to go to the jury on the above points; and on the ground that the verdict was against law and evidence.

In this term *Becher*, Q.C., and *S. Richards*, Q.C., shewed cause. There was ample evidence to lead to the conclusion that the defendants did assent to and accept the assignment of the policy, as it was alleged by the plaintiff they had done. The agents of defendants had assented to a previous transfer of this policy, just as they assented to this one. Money was paid upon the faith of it by Batchel-

der and Pettingell to the agents, and by them transmitted to the head office at Montreal, and such payment and assignment were the subject of communications by the head office to their local agents: *Add. Con.* 983; *Powles v. Innes*, 11 M. & W. 10; *Davies v. The Home Insurance Co.*, 3 E. & A. Rep. 269; *Ross v. The Commercial Union Assurance Co.*, 26 U. C. R. 559. The delay between the time when Batchelder and Pettingell became purchasers of the property on the 21st December, 1865, and the time when they got the assignment of policy executed by Morris on the 25th April, 1866, was explained. The policy was by the bargain to go to Batchelder and Pettingell with the property, and Morris was not in the country, and could not conveniently be sent to till some time after the deed was given. As to the third issue, the evidence shewed Batchelder and Pettingell did give to Poussett, the defendants' agent, notice of the further insurance, which was sufficient: *Lindley on Partnership*, 1132-3; *Angell and Ames on Corporations*, 4th ed., sec. 305; *Osser v. The Provincial Insurance Co.*, 12 C. P. 133; *Sexton v. Montgomery County Mutual Ins. Co.*, 9 Barbour 191; *Phillips on Insurance*, secs. 5, 56, 85, 87, 88, 89, 2077; *Western v. McDermot*, L. R. 1 Eq. 499; *Leake on Contracts*, 621.

*M. C. Cameron*, Q.C., and *Anderson* supported the rule. The Company did not know of the assignment to Batchelder and Pettingell, and therefore they could not have assented to and accepted it. They knew that Batchelder's name was associated in some way with the plaintiff, but in what way was not shewn, though it was quite clear it was not as assignee of the policy: *Wing v. Harvey*, 23 L. J. Chy. 511, S.C. 18 Jur. 394. Batchelder and Pettingell did not by becoming purchasers of the property insured necessarily become entitled to the benefit of the policy: *Poole v. Adams*, 33 L. J. Chy. 639. There was no evidence whatever of a satisfactory nature, if it can be said there was any at all, that the defendants' agent was ever advised of the further insurance, and it certainly never was endorsed on the policy.

WILSON, J.—There has been a great deal of litigation in this cause, and it is desirable to determine it if it be possible. I have stated the evidence fully as it was given on the trial, that the precise facts on which the judgment is pronounced may be seen.

I am of opinion there was evidence on the second issue to go to the jury.

The business of such companies must necessarily be, and in fact is, conducted chiefly by local and by travelling agents of different grades and powers.

Agents are generally empowered to receive applications for insurance, and to grant interim receipts; to inspect properties and fix the rates; to examine losses and value them; to determine the character of the risk; to receive notices and give them; to receive premiums and grant receipts for them, and sometimes to sanction assignments. Their powers are limited occasionally, and as to certain subjects; and they must always be exercised subordinately to the conditions of the particular policy, and to the special duty with which they are entrusted: *Arnould on Insurance*, 2nd ed., pp. 199, 200, 201.

In many cases the assent of the Company, or of some particular officer of the Company, and in some special or formal manner, is required. In such cases the provision must be carefully followed.

An agent has no authority to take a promissory note for the premium, instead of cash: *Montreal Assurance Co. v. McGillivray*, 13 Moore P. C. 87. Nor has he the power to grant a policy or to bind the Company to do so; they are the authority to judge of such a matter themselves. Nor can he grant a receipt to bind the Company as if a policy had been granted, unless specially authorized so to act: *Linford v. The Provincial Horse and Cattle Insurance Co.*, 10 Jur. N. S. 1066; *Fowler v. The Scottish Equitable Life Insurance Society*, 4 Jur. N. S. 1169; *Acey v. Fernie*, 7 M. & W. 151. Nor has he power to cancel or alter a policy as representing the insured, without express authority: *Xenos v. Wickham*, L. R. 2 H. L. 296.

But a Company whose local agent had notice from the assignee of the insured that the insured was residing beyond the specified limits without the license of the directors of the Company, and nevertheless received the premiums from the assignee for several years, transmitting them to the Company, saying to the assignee the policy would not be invalidated, was held to have had constructive notice of the breach of the condition, and to be precluded by their agent's conduct from insisting on the forfeiture: *Wing v. Harvey*, 18 Jur. 394; see also *Armstrong v. Turquand*, 9 Ir. C. L. R. 32; *Supple v. Cann*, 9 Ir. C. L. R. 1.

The evidence shews that Adamson, as agent for the defendants, in November, 1865, assented to the transfer of the policy by the plaintiff to Morris, and that the defendants have never denied or repudiated the act of their agent. The same agent, with the addition of Poussett, the principal local agent, and Campbell, the inspector, assented to the subsequent transfer by Morris to Batchelder and Pettingell, in January, 1866, and to the payment of the extra premium.

The evidence also shews that in January, 1866, the head office had been informed by their inspector that the risk was to be increased, and by Poussett that he had got such extra charge, and the amount of it was transmitted by Poussett to them as "Batchelder's premium, or Hendrickson's;" and that they have retained that money ever since without any offer to or intention of repaying it.

Now as no particular form of approval of the transfer is required, these facts are in my opinion strong evidence for the jury, to say whether or not the defendants assented to and accepted the assignment from Morris to the beneficial plaintiffs as alleged. The case of *Osser v. The Provincial Insurance Co.*, 12 C. P. 133, and *Ross v. The Commercial Union Assurance Co.*, 26 U. C. R. 559, are very strongly in point.

There was also evidence for the jury to say whether Morris sold the property insured without regard to the

policy, or whether the transfer of the policy was not a part of the bargain between Morris and the beneficial plaintiffs on the sale of the property.

The jury found both facts for the plaintiff. The fact that the policy was to be assigned to the purchasers will I think maintain the formal act of transfer, though it was not completed for some months after the disposition of the property.

The remaining question is, whether the beneficial plaintiff gave notice to the defendants of the further insurance of \$2500 effected in the British America Insurance Co. in August, 1866, just about a month before the fire, so that a memorandum of such other insurance might be endorsed on the policy?

If such notice were given, the finding for the plaintiff is correct; if it were not, the plaintiff must fail, for the condition declares that in such an event the policy shall be void.

The whole evidence on this point is that of Pettingell's son, now nineteen years of age, and at the time of the fire in 1866 only fifteen. He said "that Batchelder, about the 10th July, told Poussett he had insured in the British America Company the same premises for \$2500. Poussett made some reply: don't remember what it was \* \* \* Nothing said by either party as to having it endorsed on policy. I saw no policy or papers produced." Poussett said he had no knowledge of any such conversation: that he was not aware of the second insurance: that he had before been told by the inspector that there was enough insurance on the property, and his attention would have been called to the matter if he had heard that there was a further insurance made upon it to the extent of \$2500.

I think the evidence does not establish that notice was given to the defendants of the further insurance, so that a memorandum of the same might have been endorsed on the policy.

The policy itself was not produced nor spoken of, though the claimants had it in their possession. I doubt exceedingly whether notice was given at all, assuming that it

could have been given to the agent instead of to the defendants themselves.

I think this was a notice which, in the absence of express authority to the agent, or of implied authority to him to be presumed by reason of his previous dealings, should have been given to the Company themselves, or to such of their officers as could have exercised the option of cancelling the policy and of returning the proportional part of the premium.

It is quite manifest that every or any agent of the Company cannot possess the power of cancelling the policies of the Company at their mere option, however the Company may do so, with or without cause, by the present condition. And it is quite manifest that every or any agent of the Company cannot cancel the policies merely because there has been a further insurance effected, without regard to the reputation of the party insured, the character of the risk, amount of further insurance made, the value of the property as compared with the total insurance on it, or the nature and extent of the business relations between the Company and the insured, of which the agent might know nothing, and which the cancellation of the policy might seriously prejudice.

These are matters to be determined by the principals, and not by subordinate agents.

If the general agent of the insured cannot alter or cancel the policy of his principal without express authority, so neither can the general agent of the insurer alter or cancel it without the like authority, and I see no proof of any such authority having been granted to Poussett. And as this is a power to be acted upon in case of a further insurance being made, the notice upon which it is to be exercised should, I think, be given to those who are to exercise it : *Linford v. Provincial Horse and Cattle Insurance Co.*, 34 Beav. 29 ; *Barker v. Greenwood*, 2 Y. & C. 414 ; *Pike v. Stephens*, 12 Q. B. 465.

On the third issue I think the verdict should be entered for the defendants. The rule will therefore, by agreement, be absolute to enter a nonsuit.

MORRISON, J.—I concur in the judgment of my brother Wilson as to the issue raised by the third plea, and that on that issue the defendants are entitled to our judgment; but I have not been able to arrive at the conclusion that my learned brother has come to as to the issue raised by the second plea, for in my opinion the evidence fails to establish that issue for the plaintiff.

What appears is that Adamson, a sub-agent, was made aware of an intended assignment from Morris to Batchelder and Pettingell, and was asked as to the manner of making such an assignment; and that he spoke to Campbell, the defendants' inspector, who told him to follow the form used in the assignment to Morris, which statement seems to me to mean that Campbell merely intimated that what was necessary to be done in Morris's case to perfect the assignment had to be done in the assignment from Morris to Batchelder and Pettingell. In that testimony I see no evidence of a consent to, and acceptance of, that assignment by the defendants, nor do I see any evidence of it on account of the payment of the extra premium by Batchelder and Pettingell, for the increased risk in changing the use of the premises from a temperance house to one in which spirits were to be sold. Such payment is quite consistent with the non-existence of any consent by the Company, or knowledge of any such assignment having been made. To make the fact of payment of any importance it was, in my opinion, necessary for the plaintiff to shew that that receipt was given, and the money received, with the full knowledge and understanding that the assignment to B. and P. was regularly made and assented to by the defendants. Of that I think there was no evidence, nor is the plaintiff's case assisted by the letter referring to the payment of the extra premium as Batchelder or Hendrickson's. It goes to shew that the agent, Poussett, was not aware how the matter stood, but rather assumed that the head office knew, while the agent at the head office, who was called by the plaintiff, negatived every presumption that had been raised, and proved that the defendants

never were aware of or had any knowledge of the assignment to Batchelder and Pettingell; in fact, he swore the office had no notice whatever of it, and that the correspondence that passed between Poussett and himself would not and did not inform him of the assignment, and he further stated that Poussett had no authority to assent to the assignment even if he had taken upon himself so to do. On the whole, I think the defendants are also entitled to judgment on the second issue.

RICHARDS, C. J.—I concur with my brother Wilson as to the second issue. As to the question raised upon the third plea, I think that if such notices were usually given to Poussett, he is the agent to receive them. The endorsement of the notice appears to me not to be essential. Suppose the policy were lost, it could not then be made. The condition I think is intended merely to point out what the Company may do when they get the notice—they may endorse. It is not necessary that the policy should be there when the notice is given.

*Rule absolute for nonsuit.*

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MCCALLUM V. GRAND TRUNK R. W. CO.

*C. S. C. ch. 66, sec. 83—Construction of—Injury by fire.*

The plaintiff sued defendants for having negligently allowed dry wood and leaves to accumulate on their track, which became ignited by their engine, and extended to plaintiff's land, destroying his trees, &c. *Held*, that this was an injury sustained "by reason of the railway," within sec. 83 of Consol. Stat. C., ch. 66, and that the plaintiff, suing more than six months after such injury, was therefore barred.

THE plaintiff brought an action against the defendants, declaring, in the first count, for injuries sustained to plaintiff's land by fire, which, through the negligence and improper management of the defendants' servants, escaped from an engine of the defendants then being propelled along the railway, and settled in the grass and woods of

the plaintiff, whereby a large quantity of trees, cordwood, and timber, was consumed, &c.

The second count alleged that defendants were possessed of a strip of land, being the bank and side of their railway, and separating their track from the plaintiff's land, on which strip there was grass growing, and on which defendants had negligently allowed to accumulate dry wood, leaves, weeds, &c., all of a very ignitable nature, and on which from time to time fell, as defendants well knew, red hot ashes and other igneous matter, out of their engine going along the track, and there was, by reason thereof, great danger, as they well knew, that such dry wood, &c., would ignite, and the fire extend to plaintiff's land, unless such dry wood, &c., was removed, or due precaution taken by them; but that defendants so negligently kept said strip of land, and permitted it to be in such a state, that the grass, dry wood, &c., thereon took fire from such red hot ashes, &c., from defendants' engine, and thereby, and for want of due precaution by defendants to prevent such fire from extending to plaintiff's land, and their negligent omission thereof, the fire extended to plaintiff's land, and burned his trees, cordwood, and timber thereon.

The defendants pleaded not guilty, by Consol. Stat. C., ch. 66, sec. 83.

This action was brought on the 22nd January, 1869, and the injury and damage was sustained between the 21st and latter part of August, 1867.

The case came on for trial at Cayuga, before Wilson, J., when there was a verdict for the plaintiff on the second count, and \$3,500 damages, and a verdict for defendants on the first count.

At the commencement of the trial an objection was taken that the plaintiff could not succeed, as the action was not brought within six months after the time of the alleged damage. The learned Judge ruled in favor of the defendants, but he declined to nonsuit, wishing to dispose of the case as far as the evidence applied, so as to avoid a second trial; and he allowed the case to proceed, reserv-

ing leave to defendants to move to enter a nonsuit on the ground taken, should the verdict be adverse to them.

A good deal of evidence was adduced on both sides as to the cause of the injury and the extent of the damages, and as to the question of negligence in the construction and management of the engine, &c.; but it is only material for the judgment to notice, that it appeared from the evidence that the Company's railway track crossed through the plaintiff's land; and that the case made out and contended for by the plaintiff was, that fire escaped from the ash-pan of the defendants' locomotive attached to the mail train passing over the railway in the usual course of the defendants' business, and fell upon the Company's track, communicating with some grass and old railway ties, which, taking fire, through the negligence of defendants, extended to the land adjoining the land of the plaintiff, and so caused the damage.

During last Michaelmas Term, *C. S. Patterson* obtained a rule *nisi* to set aside the verdict and to enter a nonsuit, pursuant to the leave reserved, on the ground that the suit was one for indemnity for damage or injury sustained by reason of the railway, and that the same was not instituted within six months after the time of such supposed damage; and for a new trial on grounds mentioned in the rule, and also to arrest the judgment, &c. In Hilary Term following,

*Harrison*, Q.C., shewed cause. Defendants rely upon the 83rd clause of "The Railway Act," Consol. Stat. C., ch. 66, which enacts that "all suits for indemnity for any damage or injury sustained by reason of the railway, shall be instituted within six months next after the time of such supposed damage sustained." This section applies to things done in the construction of a railway, but not to negligence in the working or management of it. Whether this be the true construction or not, the section is inapplicable to this case. *Prendergast v. Grand Trunk R. W. Co.*, 25 U. C. R. 193, is in point. This action is in effect

for a breach of duty, a negligent omission of duty, not for an act committed, and if so the clause has no application: *Reist v. Grand Trunk Railway Co.*, 15 U. C. R. 355, 364; *March v. Port Dover and Otterville Road Co.*, 15 U. C. R. 138; *Harrison v. Brega*, 20 U. C. R. 324. *The Hammersmith R. W. Co. v. Brand*, L. R. 4 H. L. 171, may also be referred to. It is the construction, not the use, of the railway, which is intended by the words "by reason of the railway;" and negligence in the keeping of the track and use of the engine is not within it. Here there was ample evidence of negligence for the jury: see *Vaughan v. Taff Vale R. Co.*, 3 H. & N. 743, 5 H. & N. 679; *Fremantle v. London and North Western R. W. Co.*, 10 C. B. N. S. 89; *Stokes v. Eastern Counties R. W. Co.*, 2 F. & F. 730; *Jones v. Festiniog R. W. Co.*, L. R. 3 Q. B. 733.

*C. S. Patterson*, contra. This case is within the clause in question. In *Browne v. The Brockville and Ottawa R. W. Co.*, 20 U. C. R. 202, it was held that injury caused by collision at a crossing, owing to neglect to sound the whistle or ring the bell, was sustained "by reason of the railway," and there is no substantial difference between that case and the present. It is said there that this expression "extends to an injury sustained on the railway by reason of the use made of it." *Prendergast v. The Grand Trunk R. W. Co.*, 25 U. C. R. 193, is distinguishable. Defendants there were not charged in the declaration with negligent use of the engine, but with negligently managing a fire supposed to have occurred upon their land without their fault. The cause of action was quite independent of any use of the railway, and of the cause of the fire, and the judgment expressly proceeds upon this ground. It is not an omission or neglect of duty for which the plaintiff sues in this case, but an act done: *Mason v. The Birkenhead Improvement Commissioners*, 6 H. & N. 72; *Wilson v. The Corporation of Halifax*, L. R. 3 Ex. 114; *Davis v. Curling*, 8 Q. B. 286.

MORRISON, J.—The principal point raised on this rule for our determination is, whether the alleged damage and

injury sought to be recovered for under the second count comes within the 83rd section of the Railway Act, ch. 66, Consol. Stat. C., the injury complained of having happened in August, 1867, and this action being brought in January, 1869.

The text of the 83rd section is as follows : "All suits for indemnity for any damage or injury sustained by reason of the railway, shall be instituted within six months next after the time of such supposed damage sustained, \* \* and the defendants may plead the general issue, and give this Act and the Special Act and the special matter in evidence at any trial to be had thereupon, and may prove that the same was done in pursuance of and by authority of this Act and the Special Act."

The alleged damage or injury complained of here arose from fire or ashes escaping from the locomotive attached to the mail train while passing over the railway. Can it be said that such an injury was not occasioned or sustained by reason of the railway? It was contended by the plaintiff's counsel that the expression used in the 83rd section "by reason of the railway," as well as the section itself, only applied to the construction of the railway.

In *Browne v. The Brockville and Ottawa R. W. Co.*, 20 U. C. R. 202, it was decided that the omitting to give the proper signals of approach, the injury in that case being attributable to the omission of ringing the bell or sounding the whistle, was a cause of action within the statute. Sir John Robinson, C. J., in giving judgment, says : "As to the omitting to give the proper signal of approach, that does not come expressly within the words of the (83rd) clause, because it may be said that the damage was not sustained by reason of the railway, but rather by reason of the manner in which the carriages on the railway were driven; but we think the substance and effect are the same in the one case as the other. 'By reason of the railway' is a very comprehensive expression, and we think extends to an injury sustained on the railway by reason of the use made of it." In a previous part of the judgment the learned

Chief Justice commented on the difference of the language used in the English Act, and he said : " It appears to us that our Statute is in its effect as comprehensive as the English, though the forms of expression used are very different." The same objection was taken in that case as here, that the action was brought too late, and a non-suit was ordered.

If the interpretation put upon the 83rd section by the Court is a correct one, the plaintiff fails from his own laches in not initiating his suit earlier. If damage sustained by the omission to ring a bell is damage sustained by reason of the railway, *à fortiori* damage occasioned by the dropping of fire from a locomotive, as in the case before us, certainly comes within the meaning of the Act. The use of fire is necessary to propelling the engine ; but, irrespective of authority, the language of the section was no doubt intended to apply to cases such as we are now discussing.

A memorandum made by my brother Wilson in his note-book at the end of the trial of this cause, led me to look at the judgment of Lord Cairns in the case of the *Hammersmith, &c., Railway Co. v. Brand*, L. R. 4 H. L., at pages 220 and 222, remarks which I think have a strong bearing in this case : " Parliament authorizes the construction of the railway, but Parliament does not look upon these words, ' the construction of the railway,' or ' the execution of the works authorized,' as meaning the digging out so much land, the putting so much brick and mortar together, the making a viaduct, or the making an embankment, or the mere structural aspect of the work—it looks upon the railway as an undertaking, as a going concern, if I may so call it, as a thing which is to be there for a certain purpose, and to fulfil a certain end, which the Legislature had in its view ; and when it uses the terms, ' the execution of the works ' and ' the construction of the railway,' it appears to me to point to a living and active thing." \* \* \* Lord Cairns, further on, said : " As it appears to me that Mr. Justice Lush has expressed with

great felicity the same idea which I have entertained, I cannot do better than remind your Lordships of what Mr. Justice Lush says: \* \* \* 'So much of the general Act as is incorporated becomes part of the special Act, and its language, as part of that Act, becomes pointed to the particular work or undertaking specified, whatever it may be, whether a railway, a dock, a canal, or any other undertaking. It there authorizes the taking of the land for the purpose of, and its conversion into, the particular railway, dock, or canal, in order that it may be used as such. The undertaking is regarded as a working concern, and the idea of its use as a railway, dock, or canal, is, in the mind of the Legislature, inseparable from its construction. In professing to give compensation for all damage sustained by the owners of the adjacent land by 'the execution of the works,' or 'the exercise of the powers of the Act as regards such lands,' the Legislature must, as it appears to me, have had in view the ultimate object aimed at, the works when complete and in operation—the dock, railway, or canal—not abstractedly, as a mere excavation, embankment, or reservoir, but in connection with its appropriate traffic, and with the ordinary incidents of a business undertaking.' "

The principle and reasoning so ably enunciated is quite pertinent to the section we are discussing. The expression upon which Lord Cairns places so extended an application is, critically, more restricted than the language used in the 83rd section. Our Legislature no doubt meant and intended that the words "by reason of the railway" should include and apply to the "living and active thing," to the railway as a "going and working concern," and had in its mind the idea of its use as such.

I therefore perfectly concur in the view taken by my brother Wilson at the trial, that the words "by reason of the railway," mean by reason of the working, management or use of the railway.

The limitation clause is in itself a very proper provision. The directors, managers, and employees of such Companies

are changing yearly, and it is only reasonable, in the interest of the stockholders, who know little of these matters, that where a Company' is charged with having occasioned injury in the use of the railway, the matter should be settled or litigated at the earliest moment, so that the managers and the various servants of the Company should be at once referred to. Besides, it would be unfair to incoming shareholders that years after an alleged injury a party should bring his action, and perhaps recover a large amount of damages, the amount of which ought properly to have been charged or provided for out of the income of a previous year. In the present case a period of nearly eighteen months elapsed before the bringing of the action.

Our judgment on this point being in favor of the defendants renders it unnecessary to consider the other points taken in the rule.

WILSON, J., concurred.

RICHARDS, C.J., not having heard the argument, took no part in the judgment.

*Rule absolute for nonsuit.*

## HORSMAN V. THE GRAND TRUNK R. W. CO.

*R. W. Co.—Receipt for goods—Estoppel by—Liability.*

Action for not delivering goods received by defendants to carry for the plaintiff from Montreal to Guelph. Plea, that defendants delivered all they received. It appeared that the goods in question, 2,330 bars and 20 bundles of iron, said to weigh over 39 tons, came by ship from Glasgow to Montreal, the bill of lading being endorsed to K., the plaintiff's correspondent there: K. directed D., a forwarding agent, to forward it to Guelph: and D. received from the agents of the ship an order to the captain to deliver the iron to him, describing it only by the number of bars and bundles, which he handed to one S., the cartage agent of defendants, with the duplicate bill of lading. A few days afterwards, S., as agent for the defendants, gave him a receipt for the iron, described as 2,330 bars, less 34 short, and 20 bundles, and *specifying the weight*, to be sent by defendants' railway to the plaintiff. At the top of this receipt was a printed notice: "Rates and weights entered on receipts or shipping bills will not be acknowledged."

All the iron received from the ship by S. was delivered to the plaintiff at Guelph, the number of bars and bundles being right, but the weight fell short by about 24,000 lbs.

*Held*, without reference to the notice on the receipt, that the defendants were not estopped by the mention of the weight in such receipt, and that having delivered all the iron they received from the ship they were not liable in this action: *Richards*, C. J., doubting.

*Quære*, as to the effect of the notice.

THE declaration set out, that in consideration that the plaintiff would deliver to defendants, as carriers, &c., certain goods to be by them carried from Montreal to Guelph, and there delivered to the plaintiff, for reward, subject to and under certain terms and conditions endorsed on a receipt given by the defendants therefor, defendants promised to convey the goods from Montreal to Guelph, and there deliver the same for the plaintiff within a reasonable time, &c.; and the plaintiff delivered the goods to defendants, and defendants received them for the purposes, &c., yet the defendants did not carry and deliver the goods, and in consequence thereof the plaintiff lost a certain proportion of them, &c.

Plea, that defendants did carry from Montreal to Guelph all the goods delivered by the plaintiff, or on his behalf, to the defendants at Montreal to be carried to Guelph, as alleged, and delivered the same to the plaintiff at Guelph; and that all this was done under, and in pursuance of, and

in strict accordance with the terms and conditions of the said contract and receipt in the declaration mentioned. Issue.

At the trial, at Guelph, at the Spring Assizes of 1869, before Richards, C. J., it appeared that a quantity of bar iron, in all 2330 bars and 20 bundles, and weighing as alleged 39 tons and over, arrived at Montreal per ship *Ruby* from Glasgow, Scotland, consigned to the order of the consignee, the agents of the ship being G. & D. Shaw, Montreal,—the bills of lading of the iron in question being endorsed to one Kilby, a merchant and correspondent of the plaintiff at Montreal: that he, Kilby, under the instructions of the plaintiff, directed a Mr. Davis, a forwarding agent, to have the iron forwarded to the plaintiff at Guelph: that about the 9th October last Davis gave to one of the employees of one Shedden, the cartage agent of the defendants at Montreal, an order (which Davis received from the agents of the ship) addressed to the captain of the ship, for the delivery of the iron to him, Davis, which order was as follows:

“Montreal, 9th October, 1867.

“To Capt. McIntyre—Deliver to Mr. N. Davis the under noted, ex *Ruby*, from Glasgow.”

MARKS.	NUMBERS.	GOODS.
1 White.		2330 bars and 20 bundles iron.

(Signed) DAVID SHAW,  
Agent.

and he also handed to Shedden's clerk the duplicate bill of lading.

Some days after Davis got the following receipt:

“Ex *Ruby*,  
“Grand Trunk Railway,  
“Date, October, 1867.

“Received from Nelson Davis the undermentioned property, in apparent good order, addressed to John Horsman, Esq., Guelph, to be sent by the Grand Trunk Railway Company of Canada, subject to the terms and conditions stated upon the other side, and agreed to by their shipping

note delivered to the Company at the time of giving the receipt therefor. Duplicate receipt. Original being accomplished this to stand void.

No. of PACKAGES AND SPECIES OF GOODS.	MARKS.	WEIGHT.			
2330 bars iron. 20 bundles.	1 White.	tons	cwt.	qrs.	lbs.
		39	6	3	7

"34 bars short—rusty.

Charges \$212.28.

(Signed)

"JOHN SHEDDEN,

"per W. C. W.,

"Agent G. T. R."

At the top of the receipt was printed, as a special notice,

"Rates and Weights entered in receipts or shipping bills will not be acknowledged."

A shipping note was also signed by Nelson Davis as consignor, as follows :

"Grand Trunk Railway, Montreal,

"Date — October, 1867.

"The Grand Trunk Railway Company will please receive the under-mentioned property, in apparent good order, addressed to John Horsman, Esq., Guelph,"

&c., being in every other respect a duplicate of the defendants' receipt, except that it did not contain the number of bars short.

It appeared also from the evidence, that Shedden as such agent received from the ship 2,330 bars, less the 34 short, and the 20 bundles, the 34 short being afterwards paid for to the plaintiff by the ship owners. All the iron received from the ship by defendants' agent was sent to the plaintiff and arrived at Guelph, but on arriving there and being weighed it fell short of the weight mentioned by some 24,000 lbs., the number of bars and bundles being that mentioned in the receipt. After the iron was delivered the plaintiff was informed by Kilby that some of his iron had gone to a firm of Messrs. Hyslop & Ronalds at Chatham.

One Pringle, in the employment of Shedden, and who received the iron from the ship upon the order of Mr. Davis, stated that the mate of the ship pointed out the iron as

it was landed, and tallied the number of bars with the witness, and that it was placed alongside the ship in a pile : that all so set apart he sent to the defendants' station : that he counted every bar when put on the cart, and that he notified the officers of the ship of the 34 being short. He also stated that the iron was very rusty, so much so that the marks could not be seen on all the iron, and that which was not marked "1 white" he rejected as not the plaintiff's ; other parties were also receiving iron from the ship. He said also they never weighed iron coming from a ship, except pig iron, and that he did not consider he had anything to do with the weight.

It was also in evidence that Messrs. Hyslop & Ronalds had a quantity of bar iron (1,750 bars) by the same ship, which was received by their agent, a Mr. Ireland, in Montreal, who forwarded their iron by a schooner to Chatham. One of the firm was examined on the trial, and he stated that he ordered the iron to be received at the ship's side : that they received the whole number of bars they expected except ten bars, but they discovered they had an excess of weight, and found they had iron not for them, and they wrote to their agent, Mr. Ireland, and afterwards communicated with the plaintiff, and exchanged statements as to excess and difference in the iron, and adjusted the matter so far as they could, the plaintiff paying the freight on the iron sent to and from Chatham. He also stated that the marks were not distinct on the iron they got, and further, that their Glasgow invoice called for iron marked "1 white." This witness also said they never weighed bars, only tallied them.

The learned Chief Justice, in his charge to the jury, told them that the giving of the receipt by the defendants' agent was *primâ facie* evidence that they received the iron from the vessel : that the provision in the receipt as to weight, for which defendants were not responsible, meant that the defendants were not bound by the weight specified, and that they might shew that it was less ; but that in the present case the weight might fairly be referred

to as indicating to the defendants that what they were getting from the ship was not that which they said they received, or ought to have received, from the ship : that when parties who ship goods by the defendants place in their hands the orders and bills of lading, they have a right to expect when they get their receipt that it covers the property which they ought to have gotten before giving it : that he thought the defendants were bound by the receipt which they gave : and he left it to the jury to say whether, in fact, by delivering the 24,000 lbs. less than that stated in the receipt, the defendants had performed their contract, further telling them that, under the course of trade and business, defendants, he thought, were in effect estopped from setting up what they did as a performance of their contract to deliver. The defendants' counsel contended that the defendants were not liable unless they actually received the goods from the ship : that the defendants were not bound by the act of Shedden ; he was only authorized to give a receipt for what he got : that here all he got was delivered to the plaintiff, and consequently defendants were not liable.

The learned Chief Justice ruled that if the agent gives a receipt for what he might and ought to get, and has the means of getting, and gets something else, and in assuming to carry out the duty imposed on him he gives a receipt which the party takes and acts on, relying on it as correct, in his opinion the defendants were bound by it as much as if they had given it under their seal. He thought the evidence satisfactory that the defendants delivered all the iron they received from the ship ; and he finally left it to the jury to say whether, from the evidence, the receipt was in fact given for more iron than the defendants delivered to the plaintiff ; if so, to find for the plaintiff the amount of the deficiency ; and the jury found for the plaintiff, and \$540 damages.

During Easter Term, 1869, *M. C. Cameron*, Q.C., obtained a rule *nisi* for a new trial, the verdict being contrary to law and

evidence, and for misdirection of the learned Chief Justice, in telling the jury that the defendants were estopped by the receipt put in evidence by the plaintiff from denying that they received the goods in the receipt mentioned, and that the provision in said receipt, that the defendants were not bound by the weights stated, was of no consequence, and in telling the jury that the party signing the receipt being the agent of the defendants, they were bound by his act, whereas the party signing the receipt could only bind defendants for goods actually received, and not for goods not received.

*Harrison, Q. C.*, and *Anderson*, shewed cause (a). The defendants were rightly held estopped by the receipt. *Grant v. Norway*, 10 C. B. 665, may be relied upon on their side, but it at most only decides that the master of a ship cannot, by his signature to a bill of lading, estop the ship owner from denying the shipment. *Berkley v. Watling*, 7 A. & E. 29, does not go so far; it is questioned there whether such bill of lading be conclusive, and Littledale, J., inclined to think that it is not. But assuming that the master of a ship or an ordinary agent cannot estop his principal, the persons signing here were very different from mere agents to carry. It was proved that when goods came by sea-going ships, the bills of lading were handed to Shedden & Co., who carted them to the railway station, gave the receipts for the railway, did everything in fact, and were, practically, the Railway Company. It was clearly within their authority to give such receipts as the one in question, and if so they are not mere agents to carry, or as a ship's captain, and the general rule applies.

Then it is said truly that a bill of lading, as between carrier and consignee, is not by itself an estoppel. That is laid down, and the doctrine explained, in *Redfield on Railways*, 4th Ed. Vol. II., p. 160, and *Angell on Carriers*, 4th Ed.

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(a) The case was first argued in Easter Term, 1869, before Richards, C.J., and Morrison, J., by *Anderson* for the plaintiff, and *McMichael* for defendants, but these two learned judges not agreeing in opinion, a re-argument was directed, which took place during this term, as above reported.

sec. 231. But here the facts are different. It can hardly be contended that an ordinary receipt may not, coupled with other facts, be an estoppel. Here it was so coupled, and the rule established by *Pickard v. Sears*, 6 A. & E. 469, applies. That case, and the rule of it, is explained in *Freeman v. Cooke*, 2 Ex. 654, and both cases are further explained in *Swan v. North British Australasian Company*, 2 H. & C. 175. It is there said by Blackburn, J., citing the judgment of Parke, B., in *Freeman v. Cooke*, "To make an estoppel it is essential, 'if not that the party represents that to be true which he knows to be untrue, at least that he *means* his representation to be acted upon, and that it is acted upon accordingly; and if, whatever a man's real intention may be, he so conducts himself that a reasonable man would take the representation to be true, and believe that it was meant that he should act upon it, and did act upon it as true, the party making the representation would be equally precluded from contesting its truth; and conduct, by negligence or omission, where there is a duty cast upon a person, by usage of trade or otherwise, to disclose the truth, may often have the same effect.'" Here all these conditions were fulfilled. Shedden & Co. had the bill of lading and the means of seeing whether it corresponded with the iron received by them. They allowed some one else to take the plaintiff's iron away, and unless a certain portion had been returned by Hyslop & Ronalds the plaintiff would have been wholly without remedy. If the receipt had been assigned by the plaintiff to a third person, the defendants could not have contradicted it: *Holton v. Sanson*, 11 C. P. 606; *Woodley v. Coventry*, 2 H. & C. 164. If the plaintiff were not suing, therefore, defendants could not dispute the receipt if Shedden & Co. had authority to sign it. Can the plaintiff, then, be said in any way to have altered his position on the faith of it, for if so he stands in the same position as a third person? He did alter his position. If defendants had refused to give this receipt until they had ascertained that the iron was in the ship, it might have been sought for at once and

found, but they gave it without making proper enquiries, or ascertaining its truth, and thus putting the plaintiff off his guard prevented him from protecting himself. This is an assertion made in a receipt, and having been acted upon it must have the same conclusive effect as any other assertion would have: *Cave v. Mills*, 7 H. & N. 913; *Van Hasselt v. Sack*, 13 Moo. P. C. 185.

*M. C. Cameron*, Q. C., supported the rule. All that the defendants received they carried from Montreal to Guelph, and delivered there to the plaintiff. If, therefore, the iron was in their possession when the receipt was given, they have delivered it. If it was not in their possession, so that the receipt was given for iron not in fact received, they were not bound by it. The captain of the vessel no doubt gave all the iron which he supposed to be the plaintiff's. The plaintiff's agent in Montreal had the invoices, by which he knew exactly the description of the iron, and it was his duty to see that it was obtained from the ship. The defendants did not know this, and had no such means of information. Shedden & Co. could only bind the defendants by the actual receipt of goods, not by signing a receipt in error for goods which they never had. If they have done wrong, or acted negligently, they may be liable, but not the defendants, for it was no part of defendants' duty to attend vessels and receive goods from them. The receipt, moreover, is *primâ facie* evidence only, not conclusive, and it was clearly shewn to be incorrect: *Meyer v. Dresser*, 16 C. B. N. S. 646; *Graves v. Key*, 3 B. & Ad 313.

MORRISON, J.—The principal point for our consideration in this case is that which arises out of the first ground taken as misdirection, namely, whether from the circumstances under which the receipt in question was given, the defendants were estopped from shewing that they did not receive all the iron mentioned in it; or, in other words, whether, notwithstanding it clearly appeared that all the iron the defendants' agent received from the ship for the plaintiff was delivered to the plaintiff at Guelph,

yet the receipt being given for more than was so received and delivered, the plaintiff was entitled in this action to recover the value of the deficiency.

In determining the questions raised it is necessary to look at the pleadings and the issue. The declaration sets out, that in consideration that the plaintiff would deliver to the defendants as carriers certain goods, to be by them carried from Montreal to Guelph, and there delivered to the plaintiff, &c., the defendants promised to carry the goods and deliver, &c.: that the goods were delivered to defendants, yet the defendants did not carry and deliver the goods, in consequence whereof the plaintiff lost a certain portion of the goods, &c. To this the defendants plead that they carried all the goods delivered to them by the plaintiff or on his behalf at Montreal, and delivered the same to the plaintiff at Guelph, &c.

Now it seems to me, upon these pleadings and the evidence, putting aside for the moment the receipt, that the defendants at the trial made out their defence on the issue raised. But it was contended for the plaintiff, and the learned Chief Justice held, that the defendants' agent having given the receipt in question they, the defendants, were bound by it, and estopped from shewing, as an answer to the action, that the iron delivered by them to the plaintiff at Guelph was all the iron they received under the order of the plaintiff's agent from the officers of the ship as the plaintiff's iron, and that by reason of that receipt the defendants were precluded from contending or shewing that they did not receive the iron mentioned in the receipt and indicated by the weight specified; and that if the jury found that the receipt was given for more iron than the defendants delivered to the plaintiff, the plaintiff was entitled to recover, although it might be proved and admitted that all the iron received by the defendants' agent from the ship was duly delivered to the plaintiff.

After the best consideration I could give to the case, and while I think there is much force in the view taken by the learned Chief Justice at the trial, yet I am not prepared to fully acquiesce in it.

I cannot distinguish this case from the ordinary action against a carrier for breach of contract in not delivering goods. The declaration is in the usual form, and the plea of performance is that all the goods received by the defendants were carried and delivered to the plaintiff. This is not an action for negligence, or one in which damages are sought to be recovered for misfeasance in the conduct of some business by the defendants as agents of the plaintiff. The evidence in support of the plaintiff's case was that usually given, viz., the receipt of the carrier. Here the receipt was one signed by a clerk of the defendants' agent, and given to one Davis, who was apparently the assignee of the consignee, Kilby, the correspondent and agent of the plaintiff.

There is no pretence that in the giving of the receipt there was any fraudulent misrepresentation by the defendants' agent, or that the receipt was intended to produce any false impression in the mind of Davis or the plaintiff. Looking at the shipping note signed by Davis and the defendants' receipt to him, the assumption would be that Davis sent or delivered the iron in question as mentioned in his shipping note, and that the defendants' agent on receiving it gave a corresponding receipt in the terms of the shipping note, and that, I take it, is the usual dealing in such transactions between the Company and those who send goods by them; but I think it is apparent from the evidence that Davis, assuming that the plaintiff's iron was on board the ship in pursuance of the bill of lading, in order to facilitate the transportation of the iron, arranged that the cartage agent of the defendants should receive the iron as it was being landed at the vessel's side, and from the officers of the ship, instead of from Davis himself, and that Davis gave the necessary orders and instructions for that purpose. How the iron was described in the bill of lading does not appear, but looking at the delivery order given to Davis by the agent of the ship, addressed to the captain, all it contains is the number of bars and bundles, and that, I take it, in the absence of any evidence to the contrary,

was all the information the defendants' agent had at the time the iron was being landed and tallied by him and the mate of the vessel; and if the receipt was given after that—and it contains evidence on its face that it was, for it refers to 34 bars deficient—it was no doubt intended to refer to and cover the actual bars of iron so received by the defendants' agents. That iron was tallied and delivered by the officer of the ship to defendants' agent as the plaintiff's iron, and carted to the defendants' station, and consisted of 2296 bars and 20 bundles, as mentioned in the receipt, the 34 bars found deficient being afterwards paid for by the ship owners upon the claim of the plaintiff.

There was no evidence given at the trial to shew that the particular iron bars claimed by the plaintiff were in fact on board of the ship. They were assumed no doubt by all the parties to be there, but it may have happened that all the iron intended for the plaintiff may not have been shipped at Glasgow, although a like number of bars and bundles may have been, the invoiced weight being taken for granted as the weight of the iron when shipped as well as when landed at Montreal, the number of bars and marks being the only test.

It is shewn that other iron was sent by the same ship, consigned to Messrs. Hyslop & Ronalds of Chatham, which iron by some means got mixed with the plaintiff's either when shipped at Glasgow or when landed at Montreal, Messrs. Hyslop & Ronalds' iron being also delivered to their agent, Mr. Ireland, at the ship's side and sent by schooner to Chatham. They received also the number of bars they expected less ten, but finding the weight in excess they advised their agent of it, and the plaintiff's agent in Montreal being informed of the mingling of the iron, wrote to the plaintiff, and afterwards Messrs. Hyslop & Ronalds and the plaintiff adjusted the matter as far as possible, and exchanged the iron, the plaintiff paying the freight on the exchanged iron to and from Chatham to Guelph. It also appeared by the testimony of one of the firm of Hyslop & Ronalds that the Glasgow invoices of their iron shewed

their bars as being marked "1 white," the same mark as the plaintiff's. It is therefore likely that the origin of the difficulty arose from the carelessness and negligence of the consignors in Glasgow.

I refer to these matters, not because they have any particular bearing on the question before us, but merely as shewing that the defendants' agents were acting *bonâ fide*: and that they are not chargeable with the mingling of the iron or the transmission of the plaintiff's iron to Chatham.

Such being the circumstances attending the delivery of the iron, and it being clear that the defendants duly delivered to the plaintiff all the iron they so received, are they precluded in this action from rebutting the *primâ facie* case made by the plaintiff on the production of the receipt at the trial? I cannot see that they are. The authorities cited by the plaintiff do not, in my opinion, apply. The receipt (excluding any question arising from the provision respecting weight) is *primâ facie* evidence that the defendants received the iron mentioned, but it is only evidence, and if it be proved in point of fact that all the iron mentioned in it, either with respect to the number of bars or the weight, was not received by the defendants' agents, it cannot, in my judgment, operate against such proof.

Mr. Addison, in his Treatise on Contracts, 5th ed., p. 1022, says: "Although the express admissions of a party, inserted in a contract, are strong evidence against him, yet he is at liberty, in certain cases, when the contract is not under seal, to prove that such admissions were mistaken or untrue, and is not estopped or concluded by them unless another person has been induced by them to alter his condition, when the party is estopped, as we have seen, from disputing their truth with respect to that person and that transaction; and this rule or principle of law is applicable to mistakes in respect of legal liability, as well as in respect of matters of fact," citing *Heane v. Rogers*, 9 B. & C. 586, and *Newton et al. v. Liddiard*, 18 L. J. Q. B. 56, S. C. 12 Q. B. 925.

And in *Graves v. Key*, 3 B. & Ad. 313, Lord Tenterden says: "A receipt is an *admission* only, and the general rule is, that an admission, though *evidence* against the person who made it and those claiming under him, is not *conclusive* evidence, except as to the person who may have been induced by it to alter his condition."

And in *Bowes v. Foster*, 2 H. & N. 779, where many of the cases are reviewed, Martin, B., says: "A receipt cannot be pleaded in answer to the action; it is only *evidence* on a plea of payment; and where a defendant is obliged to prove payment, a document not under seal is no bar as against the fact that no payment has been made; for how can a jury find that payment was made when it is proved that none was ever made."

So here, the plaintiff was obliged to give evidence and shew that the defendants' agent received the iron in question to carry and deliver, and he produces the receipt as such evidence, the plea being that the defendants carried and delivered all the iron they received, and that fact being proved. As said by Martin, B., in the case cited, how can the jury find, against such proof, that the defendants received iron which was never delivered to or received by them.

It was argued that the difference in the aggregate weight of the bars forwarded and that mentioned in the receipt should have in some way attracted the attention of the defendants' agent: that the discrepancy is so great, that the receiving agent should have observed it, and notified Davis of it. If this was an action for damages occasioned by the negligent performance of a duty which the defendants had undertaken to perform, the argument would have force. In my judgment, the duty of Davis was to have seen that the plaintiff's iron was landed and delivered to the defendants' agent, the duty of the defendants being to receive and forward; and I think that the reasonable view to be taken in this case is, that Davis made the officer of the ship his agent to deliver the plaintiff's iron to Shedden, and all that the

latter had to do was to see that the ship delivered the number of bars and bundles mentioned in Davis's delivery order, and no doubt the mate and Shedden assumed that the bars and bundles so delivered were those mentioned in the order.

I do not think that the conclusion I have arrived at militates with what I conceive was the intention and understanding of the parties at or before the time the receipt was given: viz., that the defendants' agents were to receive from the officers of the ship the number of bars and bundles of iron mentioned in the delivery order given to Davis, and that the receipt was given for and intended to refer to the bars and bundles actually received by the defendants' agents, and I cannot say that if Davis had been standing by when the iron was being landed and selected any other result would have followed.

It is not necessary to a decision of this case to consider the effect of the notice or provision at the head of the shipping note and receipt in reference to weights. I take it that the object and meaning of it is, that as the party giving a shipping note may mention in it the weight of the goods, the defendants follow the same statement in their receipt, yet as the charges of carriage depend generally upon weight, they stipulate not to be bound by the shipper's statement. In many cases the mentioning the weight may be one way, and a certain one, of specifying or identifying the goods, and when the weight is inserted or used or applicable in that view, it becomes in that respect material, and the provision does not apply.

In my judgment the rule should be made absolute for a new trial without costs.

WILSON, J.—The defendants, by their agent, were instructed by the plaintiff's agent, on the order of the ship's agent, to get from the ship 2,330 bars and 20 bundles of iron marked "1 white."

The plaintiff's agent also gave the defendants' agent the bill of lading.

Defendants' agent got from the ship goods of the number and kind and marks as indicated.

In his receipt for such goods, which the defendants' agent gave to the plaintiff's agent, he stated he had received from the plaintiff's agent goods of the above number, kinds, and marks, adding also, "Weight 39 tons, 6 cwt., 3 qrs., 7 lbs." (probably got from the bill of lading); but in print were the words, "Rates and weights entered on receipts or shipping bills will not be acknowledged."

The plaintiff's agent then gave defendants' agents a forwarding or shipping receipt, as it is called, of the same goods, and in like manner described as in the last-mentioned receipt, to be forwarded by defendants' railway from Montreal to Guelph, for the plaintiff.

If defendants are concluded by their agent's receipt, specifying the weight, given to the plaintiff's agent, the plaintiff must also be concluded by the shipping order which he gave to defendants' agents to carry the goods to Guelph.

I do not think in either case they are concluded.

The defendants are not concluded, for one reason, because they "do not acknowledge the weights entered on receipts." The effect of the specific mention of weight in writing in such a case is, that goods represented to be of that weight have been received, but the signers do not admit themselves bound by that statement: *Jessel v. Bath*, L. R. 2 Ex. 267.

The master of a ship does not bind the owner of the ship for goods, for which he has given a bill of lading, that were never put on board: *Berkley v. Watling*, 7 A. & E. 29; nor for a greater weight of goods than he has actually got: *Hubbersty v. Ward*, 8 Ex. 330.

In *Coleman v. Riches*, 16 C. B. 104, one Board, the defendant's agent at his wharf, gave a receipt for goods which he had never received, on which the plaintiff, to whom the goods were to have been delivered, paid the price of the wheat to the person from whom he had bought it; and it was held the defendant was not answerable for such receipt of his agent, the agent having no actual authority

so to act for his employer. There was in that case no contract whatever that such receipts should be given as a warrant for the plaintiff paying the seller of the goods the price of them.

Even if the printed memorandum as to the weight in Shedden's receipt does not apply to the statement which is given in that receipt, but only to the statements of it as contained in other receipts, I still think Shedden's receipt for a weight he never got was not binding on the defendants. Shedden besides is not in the employment of the defendants, but carries on a particular branch of business for them, and it is well known in what capacity and for what purposes he acts.

It was well known to all parties that such articles were not and never are weighed by the mere forwarder or carrier of them between the ship's side and the railway station. The carter or waggon or van proprietor is not employed for such duty.

In *Bradley v. Dunipace*, 1 H. & C. 521, on a receipt similar to the one in *Jessel v. Bath*, it was held in the Exchequer Chamber the master was liable on a receipt he gave for 467 bags of rye flour, 35 tons 9 cwt., though there was a memorandum that he was not to be responsible for weight, because the weight was the only way of distinguishing whether the bags were or were not the proper bags he received and had to deliver. In *Jessel v. Bath* it was said by counsel that the mistake in weight made really a mistake as to the identity of the goods in the case of *Bradley v. Dunipace*.

I do not say the case is free from doubt, but I think upon the whole there was no estoppel against the defendants, and as they delivered all they got of goods of a similar kind and mark that they are not concluded by the weight subscribed to by the agent.

I think the rule should be made absolute.

RICHARDS, C. J.—The plaintiff's whole case turns expressly on this. In consequence of the receipt given by defendants

they were induced to change their position. The bill of lading of the ship was discharged, the freight was paid, she returned to Scotland, and the plaintiffs were deprived of their remedy. Whereas, if defendants had not given the receipt, or had given a receipt for the kind of iron which they did get, to wit, that which was less in weight by several tons than what they were required to get, the plaintiffs would have had notice of the mistake and been paid by the ship, as they did for the iron that was short. Does this not bring the plaintiff's case within the rule, that he having in good faith acted on the statement contained in defendants' receipt, and changed his position in consequence, defendants cannot now be allowed to say that what is in that receipt is not true?

*Rule absolute (a).*

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(a) The plaintiff had leave to amend by adding a count charging negligence in receiving the goods from the vessel, and leave to appeal.

THE CORPORATION OF THE COUNTY OF WELLAND V. THE  
BUFFALO AND LAKE HURON RAILWAY COMPANY.*R. W. Co.—Right to maintain ejectment against—Description of land.*

The defendants in 1851 staked out their railway across the land in question, and in 1853 deposited their plan in the office of the clerk of the peace, and laid the rails and built their station on the land, which was then vested in the Crown; but this was without the consent of Her Majesty, under C. S. C. ch. 66, sec. 11, sub-sec. 31, and they had taken no other proceedings to obtain a right to the possession. In 1854 the Commissioners of Public Works, under 13 & 14 Vic. ch. 13, conveyed the land to the plaintiffs by deed, in which the railway was referred to as a proposed line, and for fourteen years after defendants continued thus to use the land with the knowledge of and without any interference by the plaintiffs: *Held*, that the plaintiffs could not maintain ejectment, but must seek for compensation under "The Railway Act."

A description of land in a deed, after running to a point two chains from a line with the east side of the Port Colborne Guard Lock, proceeded "thence *south* half a degree east 25 chains, more or less, always at a distance of two chains from a line with the east side of said Guard Lock, to the northern limit of said lot 27," thence, &c. The course should have been *north* instead of south, and the effect of it as written was to go away from the northern limit of the lot and exclude the land in question. *Held*, that the course might be rejected, and a line two chains from the east side of the lock be adopted as the course to be taken in order to reach the northern limit of the lot.

EJECTMENT for part of lot 27, in the first concession of Humberstone, containing one acre and three roods, more or less.

The plaintiffs claimed title by deed from the Commissioners of Public Works, dated 10th February, 1854.

The defendants, besides denying the plaintiffs' title, claimed title in themselves under the following statutes: 12 Vic. ch. 84; 13 & 14 Vic. ch. 72; 14 & 15 Vic. ch. 121, 122; 16 Vic. ch. 45; 19 Vic. ch. 21; Consol. Stat. C. ch. 66.

A verdict was taken for the plaintiffs, subject to the opinion of the Court.

While the land was vested in the Crown the Commissioners of Public Works, appointed under 9 Vic. ch. 37, sold large tracts of land to the plaintiffs, under the 13 & 14 Vic. ch. 13, in the townships of Humberstone and Wainfleet, called the

Great Cranberry Marsh, the plaintiffs being authorized to buy the same by the 14 & 15 Vic. ch. 139, and 16 Vic. ch. 221.

The grant to the plaintiffs recited these two Statutes; and it was of "all and singular those certain parcels or tracts of land situate lying and being in the townships of Humberstone and Wainfleet aforesaid, being part of the Crown grant to the Welland Canal Company, and butted and bounded or otherwise known and described as follows: that is to say, parcel number one, commencing," &c., &c.

In a schedule attached, headed "Abstract of lands in the township of Humberstone conveyed in the within deed," but not referred to in the deed, this piece of land was entered as "first concession, easterly part of lot No. 27, 68 acres."

The description in the plaintiffs' deed, affecting this particular land, commenced on the eastern limit of lot 27 in the first concession; and after running in a course "N. 88° 45' W., 10 chains, 60 links, more or less, along the southern boundary of the proposed Buffalo and Brantford Railway, to a point two chains east from a line with the east side of the Port Colborne Guard Lock," it proceeded, "thence *south* half a degree east 25 chains, more or less, always at a distance of two chains from a line with the east side of said Guard Lock, to the northern limit of said lot number 27;" thence, &c.; instead of *north* half a degree, &c.; the effect of which, if the course must be read just as it was, and if there were nothing else to enable the Court to give the course in question a northerly direction, would be to exclude the land altogether from the plaintiffs' deed.

It was admitted that the defendants in 1851 staked out their line of railway including the land in question.

In August, 1853, the rails were laid, and in September, 1853, a map or plan of the line of railway along the land in question was filed in the office of the Clerk of the Peace for the United Counties of Lincoln and Welland, and in the fall of the same year cars for passengers and freight were run as far as Brantford. The station house of the

Company and other buildings connected therewith for the Port Colborne station were built on the land in question; and no proceedings had ever been taken by the Company to acquire a right to take possession of the land.

The questions for the opinion of the Court were, whether the land could be held to have been dedicated for the purposes of a public highway so as to prevent the plaintiffs' recovering; and whether the plaintiffs were entitled on the facts to recover in this action.

If the Court should be of opinion in the negative on either question, the verdict was to be set aside, and a verdict entered for defendants; otherwise the postea to be delivered to the plaintiffs.

The case was argued in Hilary Term last.

*Harrison*, Q. C., for the plaintiffs. The only question now in ejectment is as to the right to possession: *Robinson v. Smith*, 17 U. C. R. 218; *Prince v. Moore*, 14 C. P. 349. The deposit of the map by a Railway Company gives no right to possession as against the person having title: Consol. Stat. C., ch. 66, sec. 11, sub-secs. 5-20. The Company has no right to the possession. If they take possession and seek to hold it without first observing the preliminaries made necessary by statute, ejectment may be maintained till award made and payment or tender of the price made: *Doe dem. Hutchinson v. The Manchester, &c., R. W. Co.*, 14 M. & W. 687; *Galt v. Erie and Niagara R. W. Co.*, 19 C. P. 357. After award, and after payment or tender of the price, the Company cannot be turned out of possession: *Cotton v. The Hamilton and Toronto R. W. Co.*, 14 U. C. R. 7; *Doe Hudson v. The Leeds, &c., R. W. Co.*, 16 Q. B. 796; *Doe Armitstead v. The North Staffordshire R. W. Co.*, 16 Q. B. 526; *Rankin v. The Great Western R. W. Co.* 4 C. P. 463; *Grimshawe v. Grand Trunk R. W. Co.*, 19 U. C. R. 493. No license was ever given by the Crown to defendants to enter and take possession: Consol. Stat. C. ch. 66, sec. 11, sub-sec. 31. The plaintiffs are clearly entitled to

the land unless the Crown interfere: *Alexander v. Brame*, 30 Beav. 153; *Corporation of Belleville v. Judd*, 16 C. P. 397.

*S. Richards*, Q.C., contra. The Crown never intended to grant to the plaintiffs the defendants' line of railway. The license of the Crown to defendants may be presumed, as the line crosses the Welland Canal just a few rods from this spot, and it cannot be supposed the Company would or could have been allowed so cross that public canal without the leave of the Crown. If so, the leave of the Crown may be equally presumed to continue the railway so near to the canal after having crossed it.

WILSON, J.—In the schedule attached to the grant to the plaintiffs there is no reference to a certain lot or part of a lot by name, number, or other plain distinctive designation, so that a false description of it either in whole or in part would not hurt it.

The conveyance in the grant is of all that parcel of land described by abutments, one of which leads directly the opposite way to that which will take it "to the northern limit of the lot;" and yet it is the course which is represented as running to the northern limit.

I think that the point to which the line is to be carried being the northern limit of the lot, the course given as south half a degree east, which leads in the opposite direction, may be rejected, and that a line always at a distance of two chains from a line with the east side of the Guard Lock may be taken as a sufficient description of the course to be followed in order to reach the northern limit of the lot.

In no other way can the general grant of 68 acres of land be made effectual.

The next question is, can the plaintiffs maintain ejectment against the defendants.

That the Crown by its officers was aware of the defendants taking possession of and constructing their railway upon the land in question, and assented to it, cannot be

disputed. The fact is apparent from the mention of the railway in the grant to the plaintiffs.

It is probable the defendants did not obtain the formal "consent of Her Majesty under the hand and seal of the Governor" to enter upon and enjoy the lands for the purposes of the railway. But the defendants for three years, while the title was in the Crown, had nevertheless entered upon and taken the lands for railway purposes with the knowledge and consent of the Crown, and for fourteen years after the plaintiffs had obtained the grant from the Crown the defendants have continued to use and enjoy the same land with the knowledge of the plaintiffs, and with their consent, so far as no dissent from such use and occupation during these many years is evidence of such consent.

The defendants are not trespassers on the land.

The provisions of the Railway Act as to the Company taking possession of the land required, upon paying or tendering compensation under the 20th sub-section of sec. 11, cannot be complied with now. But that does not entitle the plaintiffs to turn the Company off by ejectment.

The way in which the Crown and the plaintiffs have dealt with the defendants has been a voluntary departure from the provisions of the Railway Act, just as has been done on many other occasions by private owners; in which case the owners do not lose the general remedies provided by the statute, but they are precluded from resuming their lands again, and they must seek redress under the statute.

I have no doubt the plaintiffs may require the Company to settle the value of the land by arbitration, and if the Company refuse to do so, they may be compelled to arbitrate by the order of the Court. The plaintiffs have not lost all redress against the defendants, if they have any claim which they can honestly urge, but they have lost the power, and no one can regret it, of doing a very great and useless act of injustice.

There is no ground for saying the land in question was

dedicated as a public highway, but we are of opinion the plaintiffs are not entitled on the facts stated to recover the land from the defendants in this action.

The postea will therefore be delivered to the defendants.

MORRISON, J., concurred.

RICHARDS, C.J., having been absent during the argument, took no part in the judgment.

*Rule accordingly.*

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### REGINA V. HOGGARD.

*Conviction—Certainty—Objections to certiorari—Practice.*

A conviction, for that one H., on, &c., “did keep his bar-room open, and allow parties to frequent and remain in the same, contrary to law :” *Held*, clearly bad, as shewing no offence.

A conviction, for that the said H. “did sell wine, beer, and other spirituous or fermented liquors, to wit, one glass of whiskey, contrary to law:” *Held*, bad, for uncertainty, as not shewing whether the offence was for selling without a license or during illegal hours.

The charge in a conviction must be certain, and so stated as to be pleadable in the event of a second prosecution for the same offence.

In shewing cause to the rule *nisi* to quash the conviction, it was objected that the recognizance was irregular, being dated before the conviction; but *Held*, that this was ground only for a motion to quash the *certiorari*, or the allowance of it.

IN this matter two convictions were brought up by *certiorari*.

The first was dated 10th December, 1869, made at Aurora, in the county of York, before Benjamin Pearson, Charles Doan, Jared Lloyd, and John Petch, and convicted George Hoggard, for that he “did, on the ninth day of October, 1869, at the village of Newmarket, in the county of York, keep his bar-room open, and allow parties to frequent and remain in the same, contrary to law”—George Boardman being the complainant; and they adjudged the

said George Hoggard, for his said offence, to forfeit and pay the sum of \$20, to be paid and applied according to law, and also to pay to the said George Boardman the sum of \$3.45 for his costs, the said sums to be levied by distress if not paid within twenty days, and in default of sufficient distress they adjudged Hoggard to be imprisoned for twenty days, &c.

The second conviction, also on the complaint of Boardman, was dated the same day, before the same Justices, for that Hoggard did, "on the thirteenth day of November, 1869, at Newmarket, in the county of York, sell wine, beer, and other spirituous or fermented liquors, to wit, one glass of whiskey, contrary to law;" and they adjudged the said George Hoggard, for his said offence, to forfeit and pay the sum of \$20, to be paid and applied, &c. (as in the other conviction).

On the 7th of January, 1870, application was made in Chambers to Mr. Justice Wilson to issue a *certiorari* to bring up these convictions into this Court. The recognizances were entered into by Hoggard and his sureties on the 4th of January. The writs of *certiorari* were issued on the 10th of January. The convictions, with the writs of *certiorari*, appeared to have been returned and filed on the 7th February.

In Hilary Term last, *Harrison*, Q.C., obtained a rule calling on the convicting Justices and the informer to shew cause why the first-mentioned conviction should not be quashed, with costs to be paid by the informer, upon the following grounds:

1. The conviction does not state any offence.
2. Nor state and shew that there was any by-law creating such an offence as therein attempted to be stated.
3. There is no averment of the hours during which the bar-room was open, to shew an offence within any such by-law.
4. Nothing on the face of the conviction to shew that the defendant was a person licensed to sell spirituous

liquors, or in any way subject to the operation of such a law or by-law, if any.

5. There was no charge laid before the convicting Justices of any such offence.

6. No evidence before them of any such offence as therein attempted to be stated.

7. The penalty and costs imposed are not warranted by law;—and on other grounds stated in the papers filed.

And why the second conviction should not be quashed, with costs to be paid by the informer, upon the following grounds :

1. That it does not sufficiently state any offence.

2. The offence, if any, is not stated with sufficient certainty.

3. No sale by retail is shewn on the face of the conviction.

4. There was no evidence before the convicting Justices of any such offence as there attempted to be stated.

The rule was served on the informer on the 14th May, and on the convicting Justices on the 6th May, 1870.

During this term *Murphy* shewed cause. The recognizance rolls attached to each of the convictions purport to be taken on the fourth day of January in the *thirty-second* year of the reign of Her Majesty, whilst the convictions referred to therein were made in the 33rd year of the reign. The recognizance is therefore irregular, and the *certiorari* ought to be quashed as to both convictions.

As to the first conviction, it is admitted it cannot be sustained.

As to the second conviction, the Statute of Ontario, 32 Vic. ch. 32, sec. 1, enacts that no person shall sell by retail any spirituous, fermented, or other manufactured liquors, within the province, without first having obtained a license authorizing him so to do. The defendant was convicted of the offence of selling wine, beer, and other spirituous or fermented liquors, to wit, one glass of whiskey, contrary to law. The conviction is sufficient, and ought to be sustained. The objection to the recognizance ought to prevail: *Rex v. The Inhabitants of Abergele*, 5 A. & E. 795.

*Harrison, Q.C., contra.* The conviction certified is sufficiently referred to in the roll. The date is mentioned, and the offence charged against the defendant is stated exactly as it is in the record of conviction. The mistake in the date of the recognizance roll can do no harm. At all events, the magistrates and informant cannot now take this objection, for they have returned the conviction. If they had desired to bring up the point, they should have taken the course suggested by the case referred to, and moved to quash the *certiorari*, or the allowance of it, and the Court would have then decided if the error referred to was important, and if so might have quashed the allowance of the *certiorari*, and enlarged the return of the writ, to enable the defendant to amend the recognizance roll or to enter into a new one.

The first conviction is bad for not shewing or reciting any by-law against keeping a bar-room open, or that defendant kept a tavern, or was in any way liable to be fined. *Newman v. The Earl of Hardwicke*, 8 A. & E. 125, shews that when it is not permissible for keepers of ale and beer houses to keep open their houses for sale of liquors before 4 A.M. nor after 10 P.M., or permit the same to be drunk on their premises, yet in a conviction for permitting beer to be drunk and consumed on the premises at a time declared to be unlawful by the order of the Justices of the Peace, against the tenor of the license granted to the plaintiff, and contrary to the form of the Statute, the exact time ought to be stated, and that the magistrates made the order which it was alleged had been violated. Section 362 of the Municipal Act does not make the conviction good. See also R. & H. Dig. "Conviction," 4.

The second conviction is also defective. It does not allege that the defendant was convicted of any of the offences named in the Statute. The offence is charged in the alternative. It states he was adjudged guilty of selling wine, beer, and other spirituous or fermented liquors. If it had stopped here, it could not be said what offence

the person named had been convicted of, whether selling wine or beer or other spirituous liquors, or other fermented liquors. The mere addition of "to wit, one glass of whiskey," cannot make the conviction certain and good in other respects. It does not say the sale was by retail. *Rex v. Morley*, 1 Y. & J. 221, is a strong authority that this conviction is bad. In that case the defendant was charged with importing or causing to be imported foreign silks. Judgment was arrested because it was uncertain which offence was charged, viz., importing the silks or causing them to be imported. Many authorities are referred to there, and the general doctrine is sustained, that informations or convictions must be certain, not in the alternative, and be so stated that if the defendant should be again prosecuted for any of the named offences he might plead the former conviction: *Regina v. Craig*, 21 U. C. R. 552; *Rex v. Pain*, 7 D. & R. 678; *Rex v. North*, 6 D. & R. 143; *Reid v. McWhinnie*, 27 U. C. R. 289. The evidence is returned with the conviction, and it does not shew that the whiskey referred to was sold by retail by defendant, or sold by any one. See 32 Vic. ch. 32, sec. 1, O.; 33 Vic. ch. 28, secs. 1, 2, O. In the *Attorney General v. Bailey*, 1 Ex. 281, it was held that sweet spirits of nitre were not "spirits" within the meaning of the English Excise Acts.

RICHARDS, C.J., delivered the judgment of the Court.

As to the conviction first referred to, the objection taken to the recognizance seems of little consequence. Many authorities lay it down that even in those cases where the statute enacts that no conviction under it shall be removed by *certiorari*, if the justice convict where there is no jurisdiction, the *certiorari* is not taken away.

In such a case, where the *certiorari* has been issued, and there has been some omission, the proper course seems to be to move to quash the writ or the allowance of it, and not to shew the defect as cause against quashing a bad conviction. When the objection is to some irregularity in

obtaining the allowance of the *certiorari* or to the issue of the writ itself, if moved against as a substantive matter the Court might give an opportunity to amend, but if urged against quashing a bad conviction no such opportunity is afforded. I am not impressed with the weight of the objection taken to the recognizance as returned on account of the error in the number of the year of Her Majesty's reign in which it is alleged to have been taken. If not more formidable than it appears to me now, I should say that the objection to it cannot according to the practice be taken at this stage of the proceedings.

The first conviction, being acknowledged to be bad on the argument, will be quashed.

The second conviction seems open to grave objections. It is not alleged that the defendant sold the wine, beer, &c., without having a license. He may have sold the glass of whiskey contrary to law, and have had a license.

Under the 23rd section of the Ontario Act, 32 Vic. ch. 32, in all *places* where intoxicating liquors are allowed to be sold by wholesale or retail, no sale or other disposal of the said liquors shall take place therein, or on the premises thereof, or out of or from the same, to any person or persons whomsoever, after 7 P.M. on Saturday night till 6 A.M. on the Monday morning thereafter. The section goes on to provide that there shall be no sales in cases where by the by-laws made by the municipality the bar-rooms are to be kept closed.

Is the offence of which the defendant is convicted for selling without a license, or having a license is he convicted for selling the liquor during the hours within which it is forbidden by law to be sold? In either case he would be selling contrary to law. The authorities seem clear that the charge must be certain, and so stated that if prosecuted again for the same offence he may plead the former conviction.

It would appear to be all the more necessary to enforce this rule in the present instance, for looking at the papers sent up with the *certiorari* it seems as if the defendant

has been convicted of the offence stated in the two convictions on one complaint, which charged him with selling or disposing of spirituous or fermented liquors contrary to the form of the statute.

The evidence returned in both cases seems to have been taken on this complaint, and a single witness deposes that he was at Hoggard's place on the 13th day of November, got one glass of whiskey, and paid five cents for it: it was five minutes to ten o'clock on Saturday afternoon. He saw Hoggard's name on the sign, and as far as the deponent could ascertain he was boss of the house.

If the defendant had a license the proper offence for which to have convicted him, if they deemed the evidence sufficient, was selling liquor between the forbidden hours. If he had no license, then he should have only been convicted of selling the spirituous liquor without a license. There being so much uncertainty about the matter, nothing being said either in the complaint, evidence, or conviction, whether the defendant had a license or not, we think the second conviction cannot be sustained either.

*Convictions quashed.*

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#### MORTON V. STONE.

*Sale of plaintiff's goods without authority — Detinue.*

The plaintiff's servant, one O., being in charge of his horses, sold one, without the plaintiff's authority, to the defendant's wife, who had the management of defendant's business, receiving \$20 in cash, and defendant's note for \$55, payable to O. Afterwards, meeting O., the plaintiff got from him the note, and \$17 in cash. The plaintiff demanded the horse from the defendant's wife, and offered her the note and the \$17, which, however, she did not take. He then brought detinue.

*Held*, that the plaintiff was entitled to recover; for that he was not bound to tender to defendant the note and the money he had received, nor could defendant retain the horse until he obtained them, at all events without giving notice that he would do so, after first demanding them.

THIS was an action of detinue, brought in the County Court of Peterborough, and tried before Adam Wilson, J.,

without a jury, at the Assizes at Peterborough, in April, 1869.

The declaration alleged that the defendant unjustly detained one brown horse of the plaintiff's, of the value of \$90.

The defendant pleaded, 1. Non detinet. 2. That the horse was the horse of defendant, and not the horse of the plaintiff, as alleged.

The evidence shewed that the plaintiff had sent a pair of horses by his servant, one O'Neil, to work at a shanty in rear of Peterborough: that in passing defendant's tavern and place of business O'Neil sold one of the horses to the defendant's wife, who in fact, from the evidence, managed all the business. She gave O'Neil \$20 in cash, and her husband's note for \$55, payable to O'Neil in nine months, for the horse. The defendant's name was signed to the note by her direction. The note was dated 18th March. O'Neil also sold the other horse to one Pratt, and there was a suit pending about that horse also.

A short time after this sale the plaintiff found O'Neil at Pratt's tavern in Lakefield, about the 20th March. Pratt got his pocket book, which contained the money and the note of defendant, amongst other things. Pratt gave plaintiff the note and \$17, the money he had kept out of that which O'Neil left in the pocket-book when he, plaintiff, went to get his horse from defendant's wife. He gave the note to the plaintiff by O'Neil's direction. He told the plaintiff if he did not get the team to return the pocket-book. The plaintiff said he would keep the pocket-book till he could see what he would do. He retained the pocket-book with the notes and money.

When the officer went to take the horse to deliver him to the plaintiff, defendant's wife said he should not have it. It was said she got the horse from O'Neil. She claimed it, and forbid the officer taking it. The writ was issued on the 22nd March.

The evidence given on behalf of the defendant shewed that the plaintiff had demanded the horse before the suit was instituted.

The witnesses called for defendant said the plaintiff spoke to Mrs. Stone, and said he came for his horse. She said she was sorry she had the luck to buy the horse; she said he might take the horse and give her the note and the money. He said he had not all the money, he had only \$17; he put his hand in his pocket and pulled out a pocket-book. The witness thought he had given her the money and note. He then said he had only \$17. She said it was hard for her to lose the \$3; could he not allow her the \$3 and take it out of O'Neil's wages. Plaintiff said O'Neil had no wages coming to him. He then folded up the pocket-book, put it in his pocket, and said, "I will make you bring my horse," and walked away.

The defendant's counsel argued that defendant's wife expressed her willingness to give up the horse on getting the money and note back; that what she did and said was equivalent to an offer to give up the horse on getting her property back, and the plaintiff should have tendered the note and cash he had with him: that what he did was equivalent to a refusal to deliver up the note and cash. If so, he could not maintain this action. O'Neil asserted in the plaintiff's presence, and in presence of defendant's wife, that the plaintiff had given him the privilege of selling the horses.

The learned judge, after hearing the plaintiff's counsel in reply, held that it was clear the property was the plaintiff's, and there was no proper evidence he ever authorized O'Neil to sell it. As to the demand on Mrs. Stone, he did demand the horse, and the learned judge thought he did all he was bound to do. The learned judge in his note suggested that under the pleadings there was no right to raise this question. He decided on the facts against defendant, and gave him leave to move to enter a nonsuit, if the Court should think on the law or facts the finding should have been the other way.

In Easter Term, 1869, *S. Richards*, Q.C., obtained a rule *nisi* to set aside the verdict and enter a nonsuit pursuant to leave reserved, on the ground that there was no sufficient

evidence of detention by defendant of the plaintiff's property or refusal to deliver up the same : that there was no offer on the part of the plaintiff to return the notes or money referred to in the evidence, and that the evidence tended to shew that the plaintiff refused to return the same ; or for a new trial, the verdict being against law and evidence, for the same reasons as those set forth as grounds of nonsuit, and for discovery of new evidence, and on grounds disclosed in affidavits. The only new evidence of any importance disclosed since the trial, that appeared from the affidavits filed, was that referred to in the affidavit of William Copeland, who stated that in the conversation between the plaintiff and defendant's wife about giving up the horse, Mrs. Stone said to plaintiff she would give him the horse if he would give her the note and the \$17.

The rule was enlarged until this term, when *Hector Cameron* shewed cause. He filed affidavits in reply meeting those of plaintiff, and argued that the verdict was correct under the evidence, and there was no ground for interfering.

*S. Richards*, Q.C., contra. It was plaintiff's duty to have disaffirmed the bargain and returned the money. The detention is the act of defendant's wife, not his, and he should not be sued alone: *Catterall v. Kenyon and wife*, 3 Q. B. 310 ; and this is a ground of nonsuit : *Mitchinson v. Hewson*, 7 T. R. 348 ; *Garrard v. Guibilei*, 13 C. B. N. S. 832 ; *Richardson v. Hall*, 1 B. & B. 50.

RICHARDS, C.J., delivered the judgment of the Court.

This suit appears to have been commenced originally on account of a difference of \$3 in the amount of money which the plaintiff offered to return to defendant's wife. He said he had \$17 of the money and the note, which he would give her, and she wanted him to give her \$3 more, and in consequence of the difficulty about this \$3 the action was brought, and we are asked to continue the litigation now on a matter of costs, for the note and the \$17 in money have been deposited with the clerk of the Court, and the defendant I understand can get them if he desires. Before

we protract this litigation, we must see that the party seeking relief is entitled to it. If the relief can only be granted on the terms of paying the costs of the trial, in mercy to the defendant we ought to refuse it.

As the record now stands, I fail to see how the defendant is entitled to relief. The evidence shews that the wife manages the business of the defendant, and though perhaps she might be made a defendant with him in actions of tort, it does not follow that he may not also be liable for her acts as his agent. There was ample evidence to make him liable, as what she did was done in managing his business for him, and he must be held liable.

There was evidence beyond all dispute of the horse being the property of the plaintiff, and no sufficient or satisfactory evidence that he authorized O'Neil to sell him.

Then under the plea of *non detinet* the defendant could not deny the property of plaintiff. All the plaintiff was required to do was to prove a detention of the property by defendant. To do this it is necessary to shew that it was or had been in the defendant's possession, for the defendant cannot be said to detain property unless he had possession of it: *Anderson v. Passman*, 7 C. & P. 193.

A demand should be made on defendant before action, or something equivalent to it, for he cannot rightly be said to detain property until after it has been demanded and he has refused or neglected to give it up: *Archbold's Nisi Prius*, 2nd ed. 399, citing *Bro. Detinue*, Pl. 42, 21 E. 4, 55.

Under the plea the defendant cannot impugn the plaintiff's right of possession of the property in question. In *Richards v. Frankum*, 6 M. & W. 420, Lord Abinger says: "If the party has a lawful excuse for the detainer, he must plead it." *Co. Lit.* 283 *a*, shews he cannot set up a lien, or any right in himself shewing that the plaintiff has not the right to immediate possession. All defendant can do is to disprove the detention; or, in other words, he may prove that he never had them in his possession, or that before action brought he gave them up to the plaintiff.

If it be assumed that the defendant might set up a lien under the other plea, how can it be properly urged there was any right on the part of this defendant to detain the plaintiff's horse until the note and money were returned?

The position taken is, that the plaintiff, if he chose, could confirm the bargain made by his servant, and if he did not intend to do so, he should return the note and money, or at all events so much of it as had come into his hands.

He was not bound by the bargain. He never sold his property, never authorized any one to sell it. True, he might if he thought proper confirm the bargain and accept the note and money, if it had been given to him. But he was not bound to do this, and until he did so the property was his own, and never passed to the defendant.

If he received the note and money to deliver to the defendant, he offered it to the defendant's wife and agent, and she did not choose to receive it. He was not bound to return it before he asked for his horse, and defendant had no right to retain the horse until the money and note were returned, and certainly had no right to do so unless a demand was made on the plaintiff for the amount of the money he had received with the note, at the same time giving him notice that if he refused to deliver them the horse would be retained.

If the plaintiff had sold a horse, and wished to repudiate the bargain, which would bind him but for some fraud that he might urge as justifying him in avoiding the sale, it would be wrong for him to keep the consideration and yet get back the horse. The law would not permit him to do so. As long as he chose to keep the consideration, and affirm his right to hold it under the bargain, he could not claim the restoration of the horse which the other party claimed to hold under the same bargain. In such a case, if he desired to annul the contract he must do so entirely; he must return the consideration and demand back his property, shewing that he did not consider there was a bargain (the fraud having in fact invalidated it).

He could no more retain the consideration than the opposite party could the property. But here the defendant held the plaintiff's horse without his consent. He had made no bargain; he did not wish to repudiate any he had made; and we see no legal principle on which he was bound to tender to the defendant the note and money, though they were in his possession.

Could this defendant maintain an action against the present plaintiff for the note and the money if he had received it from O'Neil, to be returned to the defendant, and defendant had demanded it of the plaintiff before it was returned to the party from whom he received it? I should doubt, as there would be no privity of contract between them.

On the whole, we fail to see any ground on which we could with propriety interfere to relieve the defendant. The rule must be discharged.

*Rule discharged.*

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## ALLAN V. GARRATT AND WILLIAMSON.

*Insolvent Act of 1864—Deed of composition and discharge—Execution by insolvents, &c.*

G. & Co. having made an assignment on the 4th July, 1868, a deed of composition and discharge, dated 8th August, was filed on the 14th September, 1868, not being then signed by the insolvents. It was confirmed by the County Judge on the 2nd December, 1868, but the confirmation was reversed in this Court in March following, on the ground that the insolvents had not executed it. Afterwards in the same month the insolvents executed the deed, without any previous leave from the Judge, and without refileing it; and they then set it up as a defence to this action previously brought on a note.

*Held*, that the plaintiff, a non-assenting creditor, was not bound by this deed, for the evidence (set out in the case) shewed that the members of the insolvent firm had individual creditors, and it provided only for partnership debts.

Per *Richards*, C. J. The deed was invalid also, because not properly executed by the insolvents.

Per *Wilson*, J. Such execution was not an alteration of the deed, for the insolvents being named in and parties to the deed were only perfecting, not altering, it by executing; but the deposit of such deed with and notice thereof by the assignee, under sec. 9, sub-sec. 2 of the Act of 1864, were necessary after the execution by the insolvents, and for want of this it was ineffectual.

*Held*, also, that it was no objection that some of the assenting creditors had executed in the name of their firms and by procuration, and that no power of attorney was proved, for they had accepted the composition under it.

*Held*, also, that the plaintiff was not prevented, by having proved his claim before the assignee, from going on with this action.

*Held*, also, that the plaintiff having so proved, and having obtained an order in this Court to set aside the insolvents' discharge in the Insolvent Court, with costs to be paid to him out of their estate, was precluded from objecting that the assignee was not duly appointed.

DECLARATION on a promissory note, made by defendants under the firm of Garratt & Co., dated at Toronto, 1st June, 1868, payable four months after date to the order of John Allan & Co., who indorsed it to the plaintiff. The action was commenced on the 25th November, 1868, in the County Court of the County of Hastings, and the declaration filed on the 28th February, 1869.

On the 19th March, 1869, defendants pleaded as to all except \$28.50, part of the money claimed, that the defendants heretofore, trading at Belleville, in the county of Hastings, under the firm of Garratt & Co., being indebted to the plaintiff as mentioned in the declaration, and to

others, and being unable to meet their engagements, a deed was made on the 4th July, 1868, under the provisions of the Insolvent Act of 1864, and of the amendments thereof, between the defendants, trading under the firm of Garratt & Co., of the first part, and John Parker Thomas, of Belleville, an official assignee for the said county of Hastings, of the second part, whereby defendants, under the provisions of the Insolvent Act of 1864, and amendments, being insolvent, voluntarily assigned to Thomas (accepting thereof as assignee under the said Act, and for the purposes therein provided) all their and each of their estate and effects, real and personal, of every nature and kind whatsoever, to have and to hold to Thomas, assignee, for the purposes of and under the said Act; and a list of the creditors of the defendants was thereto annexed, and other the requirements in the Act contained duly performed, to make the same a valid and binding assignment by the insolvents according to the said Act: that the assignee duly accepted the same, and received proof of the claims of the creditors of the defendants; and the plaintiff, before the commencement of the suit, elected to come in, and did come in, under the said proceedings, and assented to said assignment, and proved his claim thereunder; to wit, the cause of action in the declaration mentioned. And defendants say that thereafter, to wit, on the 8th day of August, A.D. 1868, a deed of composition and discharge, under the provisions of the said Act, and under the said assignment, was made and entered into by and between the defendants of the first part, and the several persons whose names and seals were thereunto subscribed and affixed, being also respectively creditors, or agents or attorneys of creditors of the defendants, and being a majority in number of those of their creditors who were respectively creditors for sums of \$100 and upwards, and who represented at least three-fourths in value of the liabilities of the said defendants, of the second part (which said deed, without the schedule, was set out in the plea). And defendants aver that there were no separate creditors of either of them the

defendants, and that the deed was executed by the defendants and by a majority in number of those of their creditors who were respectively creditors for sums of \$100 and upwards, and who represented at least three-fourths in value of the liabilities of the defendants; and all other requisitions under the Insolvent Act have been observed, so as to make the deed of composition and discharge have the same effect with regard to the remainder of the creditors of the defendants, or either of them, and be binding to the same extent upon him and them, as if they were also parties to it. And defendants say they have always been ready and willing to pay the said composition according to the said deed, secured as mentioned in said deed, and that they offered to pay the same according to the said deed, and before action proffered and tendered to the said plaintiff the promissory notes of the defendants endorsed in terms of said deed, but the plaintiff would not receive the same. And the defendants bring into Court under the next plea, \$28.55 as the composition on the plaintiff's claim now matured: *i.e.*, the amount of the first note made by defendants and endorsed under the terms of the composition deed, which has matured since the tender of the note by the defendants to the plaintiff; and all things have been done and happened to render the said deed of composition and discharge valid in law, and to release the defendants from the cause of action in the introductory part of the plea mentioned. And as to \$28.55, above referred to, defendants bring the same into Court, and say it is enough to satisfy the claim of the plaintiff in respect of the matters therein pleaded to.

On the 19th March the plaintiff joined issue on the pleas.

Under the Law Reform Act of 1868, the case was taken down to trial at the Spring Assizes of 1869 for the county of Hastings, before Wilson, J.

The assignment by the defendants of their estate and effects to Mr. Thomas, the official assignee, on the 4th of July, 1868, as set out in the plea, was proved, and that the plaintiff proved his claim before the assignee under that assignment at \$151.17.

The execution of the deed of composition and discharge, dated 8th August, 1868, by thirteen out of twenty-three of the creditors who had signed, and who were creditors for over \$100 each, was also proved. The claims of the creditors whose signatures were proved exceeded three-fourths in value of the total claims of all the creditors having demands of \$100 and upwards against defendants. Many of the creditors were co-partners in trade, and signed the names of their respective firms; others signed the names of the firm or of their principals by procuration; but they had all received the promissory notes given as the composition notes, except the plaintiff and Hughes Bros., of Montreal, whose debt was about \$201.39. On the 19th August, the plaintiff proved his debt at \$151.17, before the assignee, and the assignee received it on the 15th October, 1869. The assets of defendants' estate were \$9,000 or \$10,000. The assignee thought 7s. 6d. in the £ was the full value of the assets. The composition agreed to be paid was 10s. in the £.

The assignee at first was named by the board of trade of Belleville, not an incorporated board, but afterwards by the board of trade of Kingston. Several creditors had filed their claims before the deed of composition was filed. The composition deed was filed on the 14th September, 1868, and did not then contain the signatures of the defendants. The deed was confirmed by the learned Judge of the County Court of the county of Hastings, and he discharged the insolvents absolutely on the 2nd December, 1868, though the discharge was opposed by the plaintiff.

The plaintiff appealed against the decision of the learned judge of the County Court in Hilary Term, 1869, to this Court. The judgment of this Court was given on the 6th March, 1869, allowing the appeal, and the order of the learned judge in the Court below granting the discharge of the insolvents was directed to be rescinded. The principal ground on which the judgment was given was the omission on the part of the defendants to execute the deed of composition. See the report, 28 U. C. R. 266.

The signature of the defendants was affixed to the deed of composition about three weeks before the 1st of April, 1869, and after the commencement of the action. It did not appear in the evidence that any leave had been given by the learned judge of the County Court to sign the deed, or that it had been refiled after it was executed by the defendants. The witness who saw it signed by defendants said it was executed by them in Mr. Ponton's office, and Mr. Northrup, the clerk of the County Court, was not present.

The plaintiff's counsel objected at the trial that the deed of composition and discharge was not executed by defendants at the time this action was brought.

2. That that deed only relates to partnership debts of the insolvents, and does not bind non-assenting creditors for partnership debts or other debts.

3. The deed should have been for the benefit of all the creditors, without distinction as to partnership debts or individual debts.

4. There was no proper or sufficient evidence of the execution of the instrument by the discharging creditors, the execution of some being in the name of partnership firms, and it not being shewn by which partner of the firm, and whether under power of attorney or otherwise.

5. Thomas was not a duly appointed assignee, not being appointed by a duly qualified board of trade.

6. It was only shewn that three or four creditors proved their claims before the official assignee, and that is not sufficiently proven.

7. As to the plea of payment of money into Court, the amount paid in does not cover the interest, but only the face of the note, and therefore defendants must fail.

The learned judge called the attention of the parties to the fact that the pleas were in bar of the action, and not to its further maintenance, as they should have been, the deed having been executed by the defendants after the commencement of this suit. He, however, gave leave to amend by putting the pleas right as to this point if necessary.

He disposed of the case without a jury, and decided in favor of the defendants, reserving to the plaintiff leave to move to enter a verdict for him for such amount as the Court might think fit, if of opinion he was entitled to succeed in the suit. He added, he would do what he could to maintain the arrangement, but there were grave questions which required consideration.

In Easter Term, 1869, *K. Mackenzie*, Q.C., obtained a rule *nisi*, pursuant to the leave reserved, to enter a verdict for the plaintiff for \$155.69, or such other amount as the Court might think the plaintiff entitled to, on the grounds taken at the trial, and on the ground that on the evidence the verdict should have been entered for the plaintiff for the said sum, or some other sum; or for a new trial, the verdict being contrary to law and evidence.

In the same term *Wallbridge*, Q.C., shewed cause. Under section 9 of the Insolvent Act of 1864 the deed binds all the creditors of the insolvents. There were no individual creditors. The plea shews it, and it was so proved at the trial: *Bamford v. Clewes*, L. R. 3 Q. B. 729. As to the executing creditors signing in the names of their firms, they not only sign the instrument but have received the composition under it, and and therefore are bound by it, and no one else can raise the objection now. *Bloomley v. Grinton et al.*, 9 U. C. R. 455, is an authority establishing this point. As to Thomas's authority as assignee, the plaintiff proved his debt before him, and elected to prove under the commission, and cannot now deny the authority of the assignee, or proceed in this action: *Elder v. Beaumont*, 8 E. & B. 353; *Newton v. Ontario Bank*, 13 Grant 652; S.C. in Appeal, 15 Grant 283. The plaintiffs by taking issue on the plea generally merely put in issue the execution of the deed, and not the performance of all conditions precedent: *Bramble v. Moss*, L. R. 3 C. P. 461. It is sufficient to shew that the deed is executed by the proper number of creditors representing the proper amount of debts, and it is of no consequence whether they prove their claims

before the assignee or not. As to the amount paid into Court, the note was 5s. more than the plaintiff was entitled to under the composition arrangement. He cited *Wright v. Jelley*, L. R. 4 Ex. 9; *Rixon v. Emary*, L. R. 3 C. P. 546; *In re Holt and Gray*, 13 Grant 568; *McNaught v. Russell*, 1 H. & N. 611; the judgment in this Court when the allowance of the discharge of these defendants was set aside, 28 U. C. R. 266; *Clapham v. Atkinson*, 4 B. & S. 722; *Dingwall v. Edwards*, 4 B. & S. 738; *Hodgson v. Wightman*, 1 H. & C. 810.

*K. Mackenzie*, Q.C., and *Henderson* (of Belleville) contra. The deed of composition and discharge was signed by defendants after it was filed, only about three weeks before the trial, without any leave or authority from the County Judge to make the amendment.

Sub-sec. 2 of sec. 9 of the Act of 1864 contemplates the deposit of the deed with the assignee after it has been duly executed. Sub-sec. 6 authorizes the filing of the deed with the clerk of the Court, and an application for its confirmation, after giving notice. It must be filed so that the creditors may have access to it. The statute contemplates notice to be given and steps taken within a certain time after filing, or after the deed has been duly executed. Now when was this deed duly executed, and as a duly executed deed has it ever been filed? There has been a material alteration of the deed after it was filed. Under the English Act this would avoid the deed: *Sellin v. Price*, L. R. 2 Ex. 189. *Wood v. Slack*, L. R. 3 Q. B. 379, merely decides that where the deed when registered was a valid instrument, adding two names to the schedule would not make it void. The second and third grounds of objection seem concluded by the judgment already given by this Court in disallowing the discharge of the defendants by the County Judge of Hastings, and the following authorities: *Rixon v. Emary et al.*, L. R. 3 C. P. 546; *Ex parte Glen In re Glen*, L. R. 2 Ch. App. 670; *Tomlin et al v. Dutton*, L. R. 3 Q. B. 466; *European Central R. W. Co. v. Westall*, L. R. 1 Q. B. 167; *Steiglitz v. Egginton, Holt*

N. P. C. 141. The extract from the evidence given before the commissioner, and filed on the trial, shews there were separate debts. There were only sixteen names to the deed representing debts over \$100. Five of these names are signed by procuration. Being a deed each one must execute it under seal: *Steiglitz v. Egginton*, Holt N. P. C. 191. The five persons executing without authority reduces the number to eleven.

The plaintiff could not appeal until he proved his debt, and the deed of composition and discharge was not entered into until after the assignment. His proving under the commission is no bar to this action: *Harley v. Greenwood*, 5 B. & AL. 103. The payment into Court is not sufficient. It should include the interest down to the time of paying the money into Court: *Kidd v. Walker*, 2 B. & Ad. 705.

RICHARDS, C. J.—The deed of composition and discharge is set out in the judgment of Mr. Justice Wilson in the matter of the insolvency, when it was before this Court, 28 U. C. R. 266. It seems only to refer to the debts of the insolvents, and not in any way to their individual debts and creditors, if they have any. The authorities referred to shew this is the effect of the deed, and that it does not bind non-assenting creditors, whether they are the creditors of the partnership or of the individual partners only. This seems to be the view entertained by Mr. Justice Wilson in the judgment referred to.

It is contended that both defendants had individual liabilities. Williamson, in his evidence before the Judge in the Insolvent Court, which was filed on the trial of this cause, said he had a lease of C. Brown, of Montreal, of a dwelling house, for fifteen months, payable quarterly; the lease had not expired when the assignment was made; it was leased to himself individually. There was further evidence about a debt to his mother, which he said was a gift and not a debt, and she had agreed to forgive him for working for her a year since the assignment. He said he

had paid a quarter's house rent after the assignment ; the lease was current at the time of the assignment ; whatever rent was due at the time of the assignment, or accrued after, he paid after the assignment. Was not certain if rent due at time of assignment ; there was disputed rent unpaid arising out of a dispute about taxes.

In Garratt's evidence, taken before the Judge of the Insolvent Court, and also filed on the trial, he said he lived in Mrs. Hunt's house and had a written lease for five years from the 1st September, 1866, rent payable quarterly : lease then current : part of a quarter had accrued, but was not due when the assignment was made. He added that the list attached to the deed of composition and discharge shewed all his liabilities as far as he knew them.

The nature of the transaction between Williamson and his mother is not clearly shewn by that portion of his evidence taken before the Judge, which was referred to on the trial of this cause. He says he had borrowed money from his mother, in all about \$1,200. The largest part went into the business. "It was to be paid when I was able. I owe her that amount, *except the amount of notes I turned out to her*. I owe her still the difference. \* \* At the time the assignment was made I owed her a balance, and made agreement since I made assignment to remain the year and wipe out the debt. \* \* It was a gift, and not a debt which she could sue me for. \* I had agreed with brother for \$400 a-year. He and mother live together. My services go to her, and she forgives my debt." It does not appear what these notes were that he turned out to her ; nor when he turned them out. If he owed her so as to justify him in turning out notes to her, it would seem to be a debt which he owed ; and she is and was so much his creditor, that he agreed to work a year to discharge the liability. This looks very like a debt.

The lessor of the house, under the sixth section of the Insolvent Act of 1864, and section 14 of the amending Act of 1865, would seem to have a claim on the estate of the insolvents for his rent then due or accruing due under the

lease for the year then current, or perhaps more, and this certainly seems like an individual debt.

These latter remarks will apply equally to Garratt's lease then subsisting.

The deed of composition and discharge at the commencement of this suit, and to within three weeks of the trial, according to the judgment of the Court, was not a valid and binding instrument on the plaintiff, for the reason that it was not signed by the insolvents. The instrument, as I understand, had been filed. The discharge of the defendants under it had been confirmed, and an order made granting the discharge absolutely. This order having been appealed from, was disallowed. Without taking any further steps in the Insolvent Court, or giving any further notice, and before the two months contemplated by subsection 7 of section 9 of the Insolvent Act of 1864 have elapsed, these defendants, having become parties to the deed, set it up against the plaintiff's claim in this action.

Now when did this instrument become an effective and operative deed under the statute to bind non-assenting creditors? Certainly not until about three weeks before the trial, and then only by being signed by the insolvents themselves.

In the case of *Sellin v. Price*, L. R. 2 Ex. 189, referred to in the argument, the defendant executed a deed under the 192nd section of the English Bankrupt Act of 1861. It purported to be made between the debtor, of the first part, a surety, of the second part, and the several persons whose names or firms are set forth in the schedule thereto, thereafter styled creditors, of the third part. It recited that the creditors had agreed to accept a composition of 5s. in the pound, to be secured by the joint and several promissory notes of the debtor and his surety: that the composition was payable to non-executing and non-assenting creditors; and that the promissory notes had been deposited with the surety, to be held by him, in trust to deliver the same to such last-mentioned creditors respectively, on demand, as the surety by the deed acknowledged. In

consideration of the premises, each of the said creditors of the debtor, who should have executed or assented to, or who should be bound by the deed, released the debtor absolutely, reserving rights against sureties. It was declared that the deed was intended to operate under section 192 of the Bankruptcy Act of 1861. No schedule was annexed. The plaintiff had brought an action against defendant on the 2nd June, in which judgment was signed on the 18th June. The deed was executed by the defendant on the 16th June, registered on the 20th, and gazetted on the 22nd June. On the 28th, the goods were seized under a *fi. fa.* issued in the suit. A summons was taken out to set aside the execution on the 3rd July. On this the sheriff was directed to withdraw, on the defendants paying £30 into court, to abide the order of the Court.

At the hearing of the summons a doubt was suggested whether the absence of the schedule did not vitiate the deed, since without a schedule there were no parties of the third part. A schedule was afterwards added to the deed. In giving judgment *Kelly*, C. B., said : " We are of opinion that the annexation of the schedule to the deed after execution and registration, the schedule having thus become a part of the deed itself, altered the deed in a material particular, and made it void." Here the annexation of the schedule was considered an alteration of the deed, so far as to make it void.

In *Scott v. Berry*, 3 H. & C. 966, there were no persons who signed the deed as parties of the third part, but they were referred to in describing the parties in the deed as follows, " and the several other persons whose names are hereto subscribed and seals affixed, of the third part." The Court held, as none of the creditors, parties of the third part, had signed the deed, none of them could sue on it, and all the creditors, those who assented as well as those who did not, were placed on an equal footing, and the party of the second part was trustee for and could sue equally for all. The requisite number required by the statute having assented to the deed, it was held good.

We may then conclude from these two cases, that although it is not necessary that the parties of the third part should sign the deed, yet if they are referred to in a schedule to be annexed to it, if such schedule is not annexed when the deed is signed, annexing it afterwards so alters the deed that it becomes void.

In the case before us the deed when filed was clearly inoperative as a deed to bind the defendants. It was not such a one as the statute contemplated. It should have been a deed executed by the defendants, and by a majority in number of the creditors to whom debts were owing, amounting respectively to \$100.

This imperfect and inoperative deed was filed before the 25th of November, 1868, in the Insolvent Court, and the defendant's discharge under it allowed towards the latter part of December. In Hilary Term, 32 Vic., February, 1869, the matter was argued on the appeal from the decision of the County Judge, and judgment was given at the Sittings after that term, on the 6th March, 1869. The case was taken down to trial at the Assizes held in Belleville in the spring, April, 1869, and the only thing done to perfect the deed was the signing of it by the defendants, apparently without leave of the Court below to take it off the file for that purpose, or apparently re-filing after it was so signed, and no attempt was made to have it re-executed by the other parties to the deed after it was signed by the defendants.

Under the authorities I do not think that this can be considered a deed which binds the plaintiff. There surely must be some time at which the insolvent may be considered as bound by the instrument he sets up as his discharge. He cannot be permitted, when a plaintiff goes on with a suit satisfied that the defendant has no legal discharge, to set up as valid the one that has been declared void, and which has remained on file during the whole period after it was declared void down to the time of trial, and which has been altered without the knowledge or consent of the plaintiff or the authority of the Court. This

would be encouraging a very loose and unsatisfactory mode of disposing of the claims of creditors. If after this instrument in question had been declared void the Court of Insolvency had allowed it to be taken off the files to be signed by the defendants, and re-executed by the other parties to it, and afterwards it had been re-filed, I am not prepared to say that if due diligence had been used it might not be set up as an answer to the plaintiff's claim, and be allowed to be so set up as a defence under a plea *puis darrein* continuance, if the re-execution of the deed occurred after the plea, or against the further prosecution of the action if completed before the filing of the plea.

There is a case referred to in the Weekly Notes of 21st May, 1870, at page 138, *Birks et al. v. Clarke (a)*, where the composition deed was not held to prevail against a non-assenting creditor, because there was an unreasonable delay in executing the deed. There the proposition was made on the 28th of May, and the deed was not executed until the 7th of August. Here the assignment in insolvency was made on the 4th of July; the composition deed was dated on the 8th of August, and was not signed by defendants until some time in March following.

I think the plaintiff as a non-assenting creditor is not bound by the terms of this deed, both because it does not provide for the payment of individual debts, and because it was not properly executed, neither as to the parties executing, nor within the proper time.

I do not think the plaintiff can successfully contend that the assenting creditors are not bound by the terms of the deed, because they may have executed it by their copartners, or by procuration. It seems to me if they accepted the composition under the deed they ratify the deed, and cannot afterwards object that it has not been properly executed, and if they cannot object I fail to see how the plaintiff can.

I do not understand that the plaintiff having proved his claim before the assignee prevents him going on with this

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(a) Since reported, L. R. 5 Ex. 197.

action at law. *Thorne v. Torrance*, in Appeal, 18 C. P. 29, refers to many of the authorities on the subject.

After the plaintiff proved his debt before the assignee and ranked on his estate for it, it would seem rather strange if he were allowed to contend that Thomas was not a properly authorized person to whom an assignment could be made under the statute, and still more strange that he should be allowed to do this after having accepted and obtained the order of this Court to set aside the discharge allowed in the Insolvent Court, with costs to him, the plaintiff, to be paid out of the insolvents' estate: *Newton v. The Ontario Bank*, in Appeal, 15 Grant 283.

As to the question of payment of money into Court, the precedents from compositions under the English Bankruptcy Act do not apply. The provision in the deeds under that statute usually is, that when the composition is paid it shall operate as a discharge, and until default made the agreement in the deed may be set up as a bar to any action against the insolvent. Under section 9 of our Act of 1864, the deed shall bind all the creditors as if they were parties to it, and the discharge therein agreed to shall have the same effect as an ordinary discharge as therein provided.

By sub-section 3 the consent discharges the insolvent from all liabilities whatever, except as are thereafter excepted. The indenture set up by the defendants, if properly executed and binding, would, in and by its terms, discharge and release the defendants from all debts, claims and demands whatsoever, against them, and provable against their estate.

I therefore see no difficulty, if the release is binding, in amending the pleadings so as to make it a complete defence.

As, however, I have arrived at the conclusion that the plaintiff is not bound by the deed of composition and release, the verdict will be entered for him for the amount of the note and interest, less the amount paid into Court.

In conclusion, I think I may with propriety repeat the

language of Baron Piggott in concluding his judgment in *Martin v. Gribble*, 3 H. & C., at p. 638: "It is unpleasant to give judgment upon a mere technical point of law, without regard to the merits of the case, and it is desirable that the Legislature should pass a short Act embodying a form of deed of composition to be used on all occasions, so as to put an end to these much-vexed questions."

The verdict should be entered for the plaintiff for \$127.14, being the note and interest to 1st April, 1869, \$155.69, less the amount paid into Court, \$28.55.

WILSON, J.—The plea was not proved which alleges there were no separate creditors of the insolvents.

I was not disposed to interfere on appeal with the decision of the learned Judge in Insolvency, who had, when the matter was before him, decided that Williamson had no separate creditors: see 28 U. C. R. 266. But as the question comes directly before this Court, exercising a primary and original judgment, for myself I think there was such separate liability.

As to the subsequent execution of the deed by the insolvents, I think it was rightly done.

I see no reason why, when a grantor has not executed a deed by inadvertence, it may not, at any time after it has been delivered to the grantee, be perfected by him. It would take effect from that time. Nor do I see any reason why a grantee who has not executed the deed at the time of its delivery might not execute it at any time afterwards.

In both these cases the parties who subsequently execute were and are parties named in and identified by the deed, which distinguishes them from the case where the annexation of the schedule was held to be an alteration of the deed; for in that case the parties to the deed were not named or identified at the time the deed was executed by the grantees, and they only became known and ascertained when, at a subsequent time, the schedule was added.

In this case the debtors were named in and parties to the deed, by being described as parties to it of the first

part in the premises. When they executed the deed they were only perfecting it, not altering it in any way.

If the deed had been registered in its imperfect form, the subsequent perfecting of it would not have perfected the registration. It would require to be registered anew. So, if this deed had required any confirmation by the creditors, or assignee, or Judge, before it was to have effect, the deed would not have been operative if not executed properly at the time of such confirmation of it, and the subsequent execution of it would not make valid the previous confirmation. There would have to be a fresh confirmation after the completion of the deed.

But this deed required nothing of the kind. It was intended to take effect just as it is expressed in the body of it, and to be executed by those therein named. That which was so intended to have been done, and which was not done on one day, may be done on another, and therefore I think the deed was rightly executed, and became a perfect and valid instrument by the execution of it by the debtors.

There is, however, something else to be considered. The Act of 1864, sec. 9, sub-sec. 2, required the deed to be deposited with the assignee, who was to give notice thereof by advertisement, and the creditors were allowed six juridical days after the last publication of the notice to object to it. If they did not object the deed might be acted on. If any creditor did object to it, the assignee was not to act on the deed until it was confirmed by the Judge.

Now this deed would require, since its execution by the debtors, to be dealt with in this manner to make it effectual, and as that has not been done the debtors can make no use of what was done upon or in respect of the deed in its imperfect form, as applicable to the deed in its completed state.

I agree therefore in the conclusion to which the learned Chief Justice has come.

MORRISON, J., concurred with the Chief Justice.

*Rule absolute.*

## COTTER V. MASON, ASSIGNEE.

*Insolvency—Property sold by insolvent as plaintiff's agent—Right of assignee to proceeds—Evidence.*

The plaintiff purchased barley from R., telling him to consign it to C. and draw on C. for the purchase money. C. was to keep the barley as plaintiff's agent until the plaintiff directed him to sell, the plaintiff paying him such a sum as he might require by way of margin to protect himself against a fall in price. C., to reimburse his advance on R's. draft, obtained a discount from the bank on his own note secured by the warehouse receipt for the barley, which he transferred to the bank. While C. held the barley the plaintiff paid to him \$540 as margin, to hold it. The barley was shipped by plaintiff's instructions to Oswego, to the order of the bank, where it was sold; and the bank received the proceeds on the 2nd December, having previously had notice that the plaintiff owned the barley. About the 17th November C. left the country, and an attachment in insolvency having issued against him, an interpleader was directed to try whether the balance of such proceeds above the bank's advances belonged to his assignee or to the plaintiff:

*Held*, that the plaintiff was entitled to it, for the barley was his, and the money, the proceeds of its sale, never came into C's. hands, or was mixed with his general assets.

C. had advanced by paying R's. draft more than the proceeds of the barley, and it was contended therefore that there was no surplus available for the plaintiff; but *Held*, that the plaintiff was entitled to deduct from such advance the sums paid by way of margin.

After C. had absconded the plaintiff went to his office to ask about his barley, and there saw R., the manager of C's. business, who went with him to the Bank and had a conversation with the cashier: *Held*, that their evidence of what passed was clearly admissible.

THIS was an interpleader issue, the question being whether certain money, \$397.79, ordered to be paid by the Merchants' Bank of Canada into Court, and admitted to be the property either of the plaintiff or of the defendant as assignee of one Cummer, was the money of the plaintiff as against the defendant as such assignee.

The case was tried at the last Winter Assizes for the County of York, before Wilson, J.

It appeared from the evidence of the plaintiff that in the fall of 1868 the plaintiff purchased from one Rutherford 1340 bushels of barley, which by the plaintiff's directions were sent to Cummer, the insolvent, Rutherford at the time of sending drawing, under instructions from the plaintiff, upon Cummer for \$1760.65 in all, being the price of the barley, which drafts Cummer afterwards accepted and took up.

At the same time the plaintiff wrote to Cummer that he would give or "put up" any margin Cummer wanted, meaning thereby that he would deposit with Cummer any amount to guarantee him against loss in the event of the market price of barley falling below the lien he had on the barley for accepting these drafts of Rutherford, the barley so purchased being sent to Cummer to hold for the plaintiff until he thought proper to sell it.

And on the 8th October, 1868, Cummer wrote to the plaintiff: "Yours of this date to hand. I will accept against your barley as you request, and will not require any margin unless drafts mature before barley is sold." On the 12th October Cummer wrote to the plaintiff informing him of his being advised of the shipment of the barley, and that Rutherford had drawn on him for \$1.33 a bushel; and he further wrote, after stating the state of the market, "I will hold what barley you may send here thirty days, on a margin of 15 cents the bushel. Would like your instructions: shall I hold it for you, or sell it?"

On the 16th the plaintiff paid Cummer, and received the following receipt: "Received from Mr. H. Cotter two hundred dollars as margin on three cars barley, to be accounted for when barley is sold."

On the 29th October Cummer wrote to the plaintiff: "The paper on your barley matures to-morrow, and your vessel is not here. Banks will not advance over \$1 on barley, so if you want it held you will require to send me a further margin of 30 cents per bushel." And on the 3rd November the plaintiff paid \$340 to Cummer, receiving this receipt: "Received from Mr. H. Cotter the sum of \$340, to apply as margin on barley held for him."

Afterwards the plaintiff instructed Cummer to ship the barley on a vessel for Oswego, consigned to a particular firm there. After it was sent off, between the 14th and 17th November, the plaintiff called at Cummer's office, and saw a Mr. Reid, Cummer's manager, who conducted the business, and he told the plaintiff that Cummer had got into difficulties, and had to leave the country, telling

him also that it would be all right about the barley, and said he would go to the Merchants' Bank and make that plain to the plaintiff, the bank having advanced on the barley. They both went to the bank and saw Mr. Harper, the manager, Reid introducing the plaintiff as the owner of the barley to Mr. Harper, and telling him that any surplus proceeds out of the barley belonged to the plaintiff, to which Mr. Harper made no objection. The plaintiff then told Mr. Harper he might not want to sell the barley when it got to Albany, where it had gone, and said that if he wanted further margin he would put it up, and if he would not consent to that arrangement he would pay the amount of the bank's advances on it, and take it out of his hands, to which the manager replied there was no payment due against the barley till the 5th December, and that if the plaintiff did anything about it he would have to do it before that day.

On the 4th December the plaintiff again saw Mr. Harper, and wished to know if he required more margin, or if he, plaintiff, should take it out of his hands altogether by paying the advance, when Harper told the plaintiff he controlled the barley, and it would be sold in Albany. This the plaintiff objected to. The plaintiff then asked, what about the proceeds. The manager said he had no returns, and asked the plaintiff to call again when in town.

He called about the 20th December, when Mr. Harper shewed him that the proceeds of the barley was \$1733.79, the bank's advances on it being \$1334, leaving \$399.79, telling him it would be some time before he could get the balance.

He again saw Harper in February, when he proposed to pay the plaintiff \$200, stating that the assignee knew nothing of it, and if he did the plaintiff would only get 50 per cent. At first the plaintiff assented, but afterwards declined to take anything but the whole amount.

The plaintiff said that when Cummer shipped the barley from Toronto he got a bill of lading for the plaintiff, but the bank controlled the barley to secure their advance, and this being usual the plaintiff did not object.

Upon this evidence the plaintiff closed his case.

Defendant's counsel objected that the plaintiff must fail: that if any claim was shewn it was a mere money demand, for which the plaintiff must prove on Cummer's estate, and that the plaintiff had no right to the specific money against the assignee, the bank holding the surplus for Cummer, the person with whom the bank dealt, under the Dominion Act 31 Vic. ch. 11, sec. 7; and that at all events the balance was in Cummer's favor, the proceeds of the barley being \$1733.79, and Rutherford's drafts on Cummer being \$1760.65.

The learned Judge held that the margin, \$540, must be added to the proceeds of the barley, and the amount of the advance deducted from the aggregate sums; and he was of opinion that it appeared that the plaintiff was the owner of the barley, and that the bank had notice of it before the sale of the barley was made, and that when the bank got the money, the proceeds of the barley, it got it for the owner subject to its own advances, and that the plaintiff being the owner he was entitled to it, and to recover.

The case then proceeded, the defendant calling Mr. Harper, the agent of the bank, and others. Their evidence was not materially different from the plaintiff's testimony as to the main facts, except that Mr. Harper denied, or did not recollect, some of the statements alleged by the plaintiff, such as Mr. Harper proposing to him to take \$200, Mr. Harper alleging that the proposition came from the plaintiff.

It also appeared that the proceeds of the barley reached the bank here on the 2nd December, at which time Cummer's estate was seized, and that Cummer was debited with the amount of his discount, \$1334: that Mr. Harper knew on the 19th November that the plaintiff was the owner of the barley through Reid, and that he did not dispute the ownership. It appeared also that the bank had no other transaction that fall with Cummer, except about this barley.

The learned Judge directed a verdict for the plaintiff,

reserving leave to the defendant to move to enter a verdict for him.

In Hilary Term last *Harrison*, Q.C., in pursuance of the leave, obtained a rule *nisi* to enter a verdict for defendant, upon the following grounds: that the proceeds of the sale of the barley being less than the amount advanced by Cummer on the barley, there was no overplus in favor of the plaintiff entitling him to recover the amount in dispute as his property: that the Merchants' Bank were bound to return the overplus to Cummer as the indorser of the bill of lading to them, and the right to the overplus passed to the defendant as assignee: that the claim of the plaintiff, if any, was a money demand against the Cummer estate, and not a right to the specific sum of money: that if the money had been paid to the plaintiff by Cummer or his agent during the month of December, the same would have been void as against defendant, being a preference and a payment within thirty days before the execution of the deed of assignment: that the money in the bank passed to defendant as assignee;—or why there should not be a new trial, for improper reception of evidence, the learned Judge having admitted as evidence statements made by Reid after Cummer had absconded, and statements made by the manager of the bank also after Cummer had absconded.

During the same term *Richard Martin* shewed cause, citing, as to the right of the plaintiff to the money, *Hollingworth et al. v. Tooke*, 2 H. Bl. 501; *Taylor et al. v. Plumer*, 3 M. & S. 562; *Mogg et al. v. Baker*, 3 M. & W. 195; *Hamilton v. Bell et al.*, 10 Ex. 545; *Whitfield v. Brand*, 15 M. & W. 282; *Edwards v. Glyn*, 28 L. J. Q. B. 350; as to the reception of evidence, *Mortimer v. McCallan*, 6 M. & W. 69, 73, 74; *Milne v. Leisler* 31 L. J. Ex. 261.

*Harrison*, Q.C., supported the rule, and cited *Vernon et al. v. Hankey*, 2 T. R. 113; S. C. 3 Brown C. C. 313; *Bamford v. Burrell*, 2 B. & P. 1; Insolvent Act of 1864, sec. 2, sub-sec. 7, sec. 4, sub-sec. 7; *Tay. Ev.* sec. 539.

MORRISON, J.—It is quite clear from the evidence that the plaintiff purchased the barley from Rutherford about the 8th October, 1868, with a view of selling it again: that he advised Cummer of his purchase, and that he had directed the barley to be consigned to Cummer, and also advised him that Rutherford would draw on him for the amount of the purchase money, which drafts he requested Cummer to honour on the security of the barley; and that the barley was to remain in Cummer's warehouse for the plaintiff, or, to use a term of the trade, he, Cummer, was to *carry* it for the plaintiff until he directed it to be sold for him, the plaintiff if necessary "putting up" such a margin or sum of money that Cummer might require as would protect Cummer should the market value of the barley fall below the advances made by Cummer on the consignment of the barley to him; that after Cummer received the barley, to enable him to reimburse himself on account of his advance to the plaintiff, he obtained an advance from the bank on his own note, secured by the warehouse receipt of this barley, which he transferred to the bank.

While the barley was so held by Cummer, on the request of Cummer, the plaintiff paid to him on the 16th October, \$200 as margin, to be accounted for to the plaintiff when the barley was sold, and again, on the 3rd November, a further sum of \$340 as margin. These sums were paid so that Cummer should hold the barley for a better market, and that the plaintiff should not be compelled to sell.

In the meantime Cummer had his note renewed with the bank, falling due 5th December. The plaintiff also directed Cummer to ship the barley consigned to a firm at Oswego. The barley was shipped on the 3rd November, by Cummer to the order of the bank, so that when sold for the plaintiff the bank might retain the amount of Cummer's note. The barley was sold, how does not appear, but the bank received the amount it sold for.

During all this time the barley was spoken of and dealt with by Cummer as being the plaintiff's. For instance, he writes on the 17th October: "I got an advance of \$1 25c.

on your barley to-day. If you wish it held and sales to take place below \$1 40c., more margin will be required." And on the 29th: "The paper on your barley matures to-morrow. Bank will not advance over \$1 on barley, and if you wish it held you will require to send me a further margin of 30c. per bushel."

The first question we have to determine is, whose property was the barley; and it seems to me beyond doubt that this specific barley was the plaintiff's; that Cummer was merely the plaintiff's agent or factor entrusted with the possession and disposal of the barley, and that it was understood that he might pledge it in the mean time for the advance he made on it to the plaintiff. The whole object of the margin paid to Cummer by the plaintiff was to avoid a forced sale of the barley, and with the view of retaining the absolute control and right of property in it, and if the barley at the time of the insolvency of Cummer had been unsold and in the possession of Cummer, the plaintiff, upon a tender to the assignee of the original advance, less the margin paid, would no doubt have been entitled to get it.

In *Tooke v. Hollingworth* 5 T. R., 226, Lord Kenyon laid this law down: "The case of a factor has been so frequently decided, and so much taken for granted for a series of years past, that it must now be considered to be at rest. If goods be sent to a factor to be disposed of, who afterwards becomes a bankrupt, and the goods remain distinguishable from the general mass of his property, the principal may receive the goods in specie, and is not driven to the necessity of proving his debt under the commission of bankrupt; nay, if the goods be sold and reduced to money, provided that the money be in separate bags and distinguishable from the factor's other property, the law is the same."

Taking that as an incontrovertible point, as said by Lord Kenyon, it goes a great way to decide this case. Here the specific barley was sold, and the money, the produce of that sale, remains in the hands of the bank, and is so quite distinguishable.

And in *Howard v. Jemmet*, 3 Burr. 1369, Lord Mansfield held that if an executor becomes bankrupt the commissioners cannot seize the specific effects of his testator, not even in money which specifically can be distinguished and ascertained to belong to such testator, and not to the bankrupt himself.

And in *Taylor et al. assignees v. Plumer*, 3 M. & S. 575, where the question is discussed at much length, Lord Ellenborough, C. J., says: "It makes no difference in reason or law into what other form different from the original the change may have been made, whether it be into that of promissory notes for the security of the money which was produced by the sale of the goods of the principal, as in *Scott v. Surman*, Willes, 400, or into other merchandise, as in *Whitecomb v. Jacob*, Salk. 160, for the product of or substitute for the original thing still follows the nature of the thing itself, so long as it can be ascertained to be such, and the right only ceases when the means of ascertainment fail, which is the case when the subject is turned into money, and mixed and confounded in a mass of the same description. The difficulty which arises in such a case is a difficulty of fact and not of law, and the *dictum* that money has no ear-mark must be understood in the same way; *i. e.* as predicated only of an undivided and undistinguishable mass of current money. But money in a bag or otherwise kept apart from other money, guineas or other coin marked (if the fact were so) for the purpose of being distinguishable, are so far ear-marked as to fall within the rule on this subject which applies to every other description of personal property, whilst it remains (as the property in question did) in the hands of the factor or his general legal representatives."

And in the case of *Scott v. Surman*, Willes 404, referred to by Lord Ellenborough, Willes, C. J., says: "Why are goods considered still as the owner's? Because they remain in specie, and so may be distinguished from the rest of the bankrupt's estate. But as money has no ear-mark it cannot be distinguished. Otherwise to be sure in

reason the thing produced ought to follow the nature of the thing out of which it is produced, if it can be distinguished; and so long as it remains a debt it is equally distinguishable; or if it be laid out in a particular thing, as the case in *Salkeld* is."

And in the same case, at p. 402, the Chief Justice says: "My notion is, that assignees under a commission of bankruptcy are not to be considered as general assignees of all the real and personal estate of which the bankrupt was seized and possessed, as heirs and executors are of the estates of their ancestors and testators; but that nothing vests in these assignees even at law but such real and personal estate of the bankrupt in which he had the equitable as well as the legal interest, and which is to be applied for the payment of the bankrupt's debts."

By the Insolvent Act of 1864, which was in force when Cummer became insolvent, the assignment vested in the assignee, by sub-sec. 7 of sec. 2, all the insolvent's personal estate, debts, assets and effects; and sub-sec. 7 of sec. 4, enacted that no power vested in the insolvent, or property or effects held by him as trustee or otherwise, for the benefit of others, should vest in the assignee.

Applying the principles laid down in the authorities I have referred to, I am of opinion that the plaintiff is entitled to hold his verdict. No doubt can be entertained that the barley was the plaintiff's, and it is equally clear that the money which was the produce of its sale was not mixed undistinguishably in the general assets of the insolvent. It never in fact passed into his hands, but came into the hands of the bank from the purchaser, and remained with the bank until ordered to be paid into Court; and the object of this suit is to ascertain whether the money, the produce of the plaintiff's barley, belongs to the plaintiff or to the assignee, the defendant.

Now the whole reasoning of these cases shews that if the goods be sold or converted into money, that if the produce of such sale, whether money, goods, notes, or as a debt due from the vendee, can be ascertained or distinguished, the

owner is entitled to such produce. There can be no doubt that the honesty and justice of the case is with the plaintiff, and he is in point of law entitled to the money, and not the assignee. This is one of those cases where an endeavour is made to take the property of one man to pay the debts of another.

It was also contended that Cummer having advanced by paying Rutherford's drafts to the amount of \$1760.65, and the barley having produced only \$1733.29, that there was no overplus going to the plaintiff, and the plaintiff was not entitled to succeed. I perfectly concur in the view taken by my brother Wilson at the trial, that the plaintiff was entitled to add to the proceeds of the barley the margin of \$540, and that he was entitled to the difference between these sums, \$2273.29, and the advance to Rutherford: in other words, that the amount paid as margin was in fact what it was intended to be, paid in reduction of the advance made originally by Cummer on the barley; and so when the barley was sold the only advance then existing was the amount paid by Cummer, less the amount, \$540, he received as margin, viz., \$1220.65, leaving a surplus going to the plaintiff of \$512.64. The bank, however, having advanced \$1334 to Cummer on the security of the barley, the plaintiff was only entitled to receive from the bank the amount paid into Court.

Nor do I see anything in the second objection taken in the rule, for the bank had full notice before the sale of the barley that it was the plaintiff's, and they treated with the plaintiff as owner, and after they deducted the amount due the bank on Cummer's note, and for the payment of which the plaintiff's barley was pledged as collateral security, the plaintiff was entitled to the overplus. I see nothing in the 31 Vic. ch. 11, sec. 7, to restrain or prevent the bank from paying the surplus to the true owner.

The last objection taken in the rule is the admission of evidence of statements made after Cummer left the country by Reid, the manager of Cummer's business, and Mr. Harper the manager of the bank. During the argument I could

not understand the precise ground upon which the evidence was alleged to be inadmissible. The plaintiff calls at Cummer's office to make enquiry about his barley, and finds the person managing Cummer's business there, who tells him that it would be all right about his barley, although Cummer had gone away, and that he would go to the bank and make that plain to the plaintiff. They therefore go to the bank and see the manager of the bank, and have a conversation about the plaintiff's barley. I cannot see upon principle that such evidence ought to have been rejected. It was not any admission by an agent against his principal, it was an act by the agent, and I think admissible, irrespective of its being connected with the original transaction. Nor can I see the slightest objection to the evidence as to the manager of the bank. Both Reid and Harper were examined at the trial, and gave their account of what passed.

On the whole I see no ground to disturb the verdict, and I think that the rule should be discharged.

WILSON, J. concurred.

RICHARDS, C. J., having been absent during the argument, gave no judgment.

*Rule discharged.*

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## \* MURPHY V. HEALEY.

*Survey—Single or double-fronted concession.*

The first five concession of a township were surveyed in 1797, the lots being 29 chains 87 links in width. About 1813, an original post was found by a surveyor in front of the fifth concession, by which he determined the limits of the lots, and they had been settled on accordingly. In 1821 the remaining concessions were surveyed, under instructions from the Surveyor-General, which directed the several concession lines to be produced beginning with that between the fifth and sixth concessions, and from the centre of each line at the distance of 50 links each way, right and left, at right angles thereto, the several lots of the width of 29 chains 37 links were to be posted. The surveyor, under these instructions, double posted the line between the fifth and sixth concessions, making the lots 29 chains 37 links wide, and patents were afterwards granted for half lots in the concession. It was contended that this made the fifth concession double-fronted, having the lots 29 chains 87 links wide in the front and 29 chains 37 links in rear. One of these patents however made the rear half 29 chains 87 links wide, and the Government plans shewed no jog in the side lines of the fifth concession.

*Held*, that the concession was not double fronted, for the evidence shewed that the whole of it had been surveyed as a single fronted one in 1797, and the surveyor in 1821 had no authority to change it, if he so intended.

TRESPASS to part of lot 25 in the 5th concession of Hungerford.

Pleas, not guilty; land not the plaintiff's; leave and license; and that the land on which the trespass was committed was part of 26 in the 5th concession, which was the freehold of defendant.

The case was tried at Belleville, before Wilson, J., at the Spring Assizes, 1869, when a verdict was rendered for the plaintiff. A great deal of evidence was given on both sides to establish and defeat the plaintiff's case, which was two-fold, by length of possession and under a paper title claiming the land in question as part of lot 25. The main question at the end of the trial was whether the fifth concession was a double or single-fronted concession, and the evidence bearing upon this point is referred to in the judgment.

During Easter Term, 1869, *J. A. Boyd* obtained a rule *nisi* for a new trial, on the ground that the verdict was contrary

to law and evidence, and the weight of evidence, and for misdirection and insufficient direction, in this, that the learned Judge told the jury that if there was a survey of the front of the fifth concession it was a survey of the whole concession: that he should have told the jury that it required a concession line to be run in the rear of the concession before its limits could be ascertained, and that planting double posts between the fifth and sixth concessions made the fifth a double-fronted one; and that the Government plans, surveys, and patents put in evidence, recognized Benson's survey and destroyed the presumption of any former survey inconsistent therewith: that the jury should have been told that there was no sufficient evidence of Aikins's survey, whereas the Judge told them it was sufficient; and that they should have been told that Aikins's survey only applied to the front of the fifth concession, and that the subsequent survey regulated the the rear of the concession, treating it as a double-fronted one.

During last Michaelmas Term *Wallbridge*, Q. C., shewed cause. He cited *Warnock v. Cowan*, 13 U. C. R. 257; *Marrs v. Davidson*, 26 U. C. R. 641; Consol. Stat. U. C. ch. 93, sec. 14.

*J. A. Boyd* supported the rule, citing *O'Hearn v. Donelly*, 13 C. P. 513; *Keeley v. Harrigan*, 3 C. P. 173; *McLachlin v. Dixon*, 4 C. P. 71, 1 E. & A. 307; *Holmes v. McKechin*, 23 U. C. R. 52, 321; Consol. Stat. U. C., ch. 93, sec. 28; 32 Vic. ch. 38, sec. 1, O.

MORRISON, J.—The point involved in this case is whether the fifth concession, in which the land in dispute lies, is a single or double-fronted concession.

The first five concessions in the township of Hungerford were surveyed by a Mr. Aikins in 1797, and it is conceded that at that period surveying with double-fronts was not practised.

A Mr. Emerson, a surveyor, was examined, who stated that eighteen years ago he chained the fifth concession:

that he found an original post in front of the fifth concession between lots 27 and 28, but no other, and that, in order to ascertain the limits of the lots, he divided the land between that post and the westerly limit of the township on the ground, making the necessary allowances for roads between the twenty-seven lots, and gave to each 29 chains 70 links, the intended original width being 29 chains 87 links; and he said that the owners had all settled by his then survey. He said also that he found posts in the rear of the concession but not correctly placed; that the fifth concession was laid out as a single-fronted one, and he treated it as such.

In June, 1821, the remaining portion of the township was ordered to be surveyed, and was surveyed by a Mr. Benson, under written instructions from the Surveyor General, who instructed him to survey three other townships and the unsurveyed parts of Hungerford; and in these instructions the Surveyor General says, "What appears to remain for you to survey are the concession lines between the fifth and sixth, sixth, and seventh, &c., to 14th and 15th concessions. \* \* You will also have to survey the eastern boundary line of Hungerford, from where it has been discontinued in the fifth concession until it intersects the produced southern line of Madoc and Elziver. \* \* The depth and width of the lots are to be 68 chains 14 links by 29 chains 37 links, with an allowance of one chain for each concession; and in order that the new lots, concessions, &c., to be surveyed by you in Hungerford may correspond with those formerly surveyed therein to the fifth concession." After directing him to commence by a careful examination of the original boundary lines surveyed, he proceeds, "You will produce the eastern and northern boundary of that township, and then the several concession lines therein, beginning with that between the fifth and sixth concessions, from the centre of which said concession lines, at the distance of 50 links each way right and left at right angles thereto, the several lots, each of the width of 29 chains 37 links, are to be posted, marked, and numbered,

until the whole be completed in survey upon the principle of the diagram" (which apparently accompanied the instructions, but was not produced at the trial).

Mr. Benson, to whom these instructions were given, was examined at the trial, and he said he double-posted the concession line between the fifth and sixth concessions and so throughout the rear concessions: that is, he commenced on the line between the fifth and sixth concessions, beginning in the centre of the allowances for road, and laying out the corner of every lot at right angles 50 links each way, north and south, at right angles with the line, and double-posted the lines: that he planted a post between lots 25 and 26 on this line between the fifth and sixth concessions, and so in that way the rear end of the lots in the fifth concession was marked as if laid out in a double-fronted concession; and he made the lots he laid out 29 chains 37 links in breadth, while in the fifth concession the lots laid out by Aikins were 29 chains 87 links. He also stated the old surveys were single-fronted, and that he never knew an old survey of part of a concession single in front and the rear afterwards made on the rule of a double-fronted concession.

Now it seems to me that what Benson did in laying out the commencement of his survey between the fifth and sixth concessions was to place posts there as indicating under his instructions the centre of the road, and his placing a post at the angles of the 25th and 26th lots, indicated the line between those lots on the sixth concession. But he had nothing to do with the lots in the fifth concession, that is, he could not and had no authority to alter the limits of those lots; and his instructions were to lay out the lots on the new survey 29 chains 37 links wide, while those laid out by Aikins were laid out 29 chains 87 links; so, as Benson said, if his posts governed, lot 25 in the fifth concession would be 29 chains 87 links in front, and 29 chains 37 links at the rear. He had no instructions to interfere with the lots in the fifth concession, his duty commencing with finding the centre of the

road allowance between the fifth and sixth concessions, and then laying out and surveying the rear concessions according to his orders; and all that he did was to put posts on the rear of the fifth concession opposite the posts he placed as indicating the angles of the lots in the sixth concession; but he made no survey of the lots in the fifth concession.

A patent, dated in 1836, was put in, granting 500 acres, composed of the south and north halves of 29 and 30, and the south-west and north-west quarters of 32, in the fifth concession, as evidence that the Government recognized Benson's survey; also a patent in 1830 for the south and north halves of 24 in the fifth concession; but on examining the last patent, the metes and bounds being set out, the description commences at a post at the south-east angle of the lot, a post which must have been planted by Aikins, and gives to the half lots the width of 29 chains 87 links according to his survey; and from those patents it was pressed that the Government recognized the survey as being double fronted.

I can well understand how the descriptions of these two surveys may have been confounded in the land granting department. We every day see, in describing lots made under old surveys, a want of care and attention; that on plans and maps lots and concessions are laid down not according to the actual state of things on the ground, and that the descriptions in grants do not agree with the plans. In this very case Mr. Benson stated that in making the maps of this township the lots are drawn in straight lines from the front to the rear of the township, without shewing jogs, and in this case the lots in the fifth concession, according to Aikins's survey and the work on the ground, gave in front a width of 29 chains 87 links, while if we adopt Benson's posts in front of his new survey as posts governing the lots in the fifth concession, the breadth is reduced in rear by 50 links.

Now it seems to me highly improbable that the fifth concession was only surveyed in front by Aikins, and that his survey was not an actual survey of the lots and the whole

concession as in a single-fronted concession. The survey of the lots may be completed without reference to the centre of the rear concession line. The surveys of Aikins and Benson are both complete in themselves, and both can stand irrespective of the other—the only question being, did Benson, by merely placing posts opposite to what he made to be governing angles of the front of the lots in the sixth concession, and what no doubt he supposed would correspond with the rear angle of the lots in the fifth concession, constitute these posts as being the governing rear boundaries of those latter lots.

I think not. He had no authority to do so. The instructions from the Surveyor General assume that the lots in the fifth concession (as no doubt they were) were surveyed and laid out. The instructions to Benson were to survey the unsurveyed portion of the township in the rear of the lots in the fifth concession, giving them a width of 29 chains 37 links, in order that the new lots, concessions, &c., may correspond with those formerly surveyed. It is quite clear from the patent issued, as well as from the work on the ground, that the lots laid out by Aikins were 29 chains 87 links in width.

Mr. Benson had with him the original instructions signed by Mr. Ridout, the Surveyor General, at the trial, and I have them before me. The figures 29 chains 37 links as indicating the intended width of the lots in the new survey occur twice, and it is quite palpable that the figure 3 is written over an erasure, evidently of the figure 8. This did not appear to be noticed at the trial, nor the attention of Benson drawn to it. Was it originally intended to be a 3, or was it through some mistake or error altered from 8 to 3? It is clear that Benson carried on his survey on a width of 29 chains 37 links; while Aikins's survey was on one of 29 chains 87 links. The plan produced at the trial (it was not before us at the argument) as it appears from the notes, indicated a straight line at right angles to the concession line as the side line of lot 25 from the front to the rear, and corresponding with the side

line of 25 in the sixth concession, although in fact the end of these lines would and ought to be two rods apart.

The Surveyor General says, "You will produce the several concessions therein, beginning with that between the fifth and sixth concessions; that is, at the rear of the lots in the fifth concession, and from the centre of the concession line at the distance of 50 links each way, &c., the several lots each of the width of 29 chains 37 links are to be posted." These instructions point clearly to lots not theretofore laid out and surveyed, and are intended solely for the new survey commencing at and including the sixth concession. The instructions were of a general character, and intended to apply to this township as well as the unsurveyed part of Hungerford, and not intended to apply to the lots in the fifth concession, which had been surveyed under the old system, single-fronted.

If we are to assume, as I suppose we must, that the instructions were to lay out the lots of a different breadth from those laid out in the fifth concession, or if it was intended that the rear of the lots should be less than the front of those lots, the Surveyor General would have so expressly directed. I do not think that he so intended. My own impression is that some mistake had occurred in the instructions to Benson, or perhaps in the original instructions to Aikins, and which was not discovered until the instructions to Benson were written out, that Aikins's width would give about 204 acres, and it was altered to the width of 29 chains 37 links, which would give as near as possible 200 acres, and the figures were altered without changing the other portion of the instructions predicated on the width of 29 chains 87 links.

I can well understand Benson, in carrying out literally his instructions, after determining the centre of the concession line in front of the sixth concession, placing posts at the angles of the front of the lots in that concession, and placing posts opposite them at the other side of the concession, and in the rear of the lots of the fifth concession, his general instructions directing him to do so; but I cannot

see my way to holding that by his doing so such posts unnecessarily placed there are to displace the previous boundaries of the lots in the fifth concession, laid out 25 years previous under the single-fronted system, and that his survey of the sixth concession and determination of the centre of the line is to make the fifth concession a double fronted one—*i. e.*, governed in front by the survey made in 1797, and in the rear by Benson's posts so placed in 1821. No doubt Mr. Benson assumed at the time of his survey that the breadth of the lots he was to lay out, as well as the courses to be run, were the same as those in the fifth concession.

The learned Judge in his charge told the jury that the real question was, whether the disputed portion was part of 25 or lot 26, and that depended upon whether the fifth concession was properly a single-fronted or double-fronted concession : that if Aikins, in 1797, surveyed the fifth concession he made a single-fronted concession, and that in that case the plaintiff was entitled to recover, while if he did not the defendant was entitled to succeed ; and that he was inclined to think that the survey of Aikins was a survey of the whole concession, and that there was evidence to go to them of his having made such a survey. After fully considering the case and all the evidence, I am of opinion that the learned Judge took the correct view of the case, for in my judgment the whole evidence goes clearly to shew that the lots in the fifth concession were originally laid out by Aikins, and as a single-fronted concession, and the lots in that concession are governed by the posts placed by Aikins in the front angles of the lots ; and that the learned Judge did not misdirect the jury, and that their finding was according to the evidence, and that this rule should be discharged.

WILSON, J., concurred.

RICHARDS, C. J., not having heard the argument, gave no judgment.

*Rule discharged.*

## TAYLOR V. KNOWLES.

*Agreement for sale of land—Statute of Frauds—Part performance—Evidence to connect writings.*

The defendant wrote to the plaintiff's solicitors that he would give \$3,100 for plaintiff's house and lots, and a few days after he signed the following memorandum: "I will give \$3,500, together with the choice of one horse, waggon, and teaming harness, or buggy," to which was added "accepted" with plaintiff's signature. The plaintiff conveyed the land to defendant, who paid the sum required down, and gave a mortgage for the balance, but defendant would not give the horse, &c., for which the plaintiff sued:

*Held*, reversing the judgment of the County Court, that he could not recover: that the contract was within the statute of frauds, and being entire, the part performance could not enable the plaintiff to sue for the part unperformed, without proof of a written agreement; and that such proof failed, for parol evidence, which was inadmissible, was required to connect the memorandum with the previous letter, so as to shew the consideration.

## APPEAL from the County Court of Waterloo.

The declaration alleged that by an agreement in writing the defendant, in consideration that the plaintiff would sell and convey to the defendant certain real estate of the plaintiff, for the price of \$3,500, and the choice of one horse and waggon, and teaming harness or buggy of the defendant, he, the defendant, agreed to give to the plaintiff therefor the said sum and the choice of one horse, &c.; and that, although at the request of the defendant the plaintiff made a conveyance of the said real estate to the defendant, and the defendant accepted the same from the plaintiff, and although the defendant paid the plaintiff the said sum of money, and the plaintiff duly made choice of, and requested the delivery by the defendant to the plaintiff of a horse, &c., the defendant refused to deliver the same to the plaintiff.

Plea, that defendant did not agree as alleged. There was a second plea, upon which nothing turned.

At the trial a letter from the plaintiff to defendant was put in, dated January 9th, 1869, saying that he had been informed the defendant would purchase this property, referring to it particularly and to its advantages, and that

he would let it go to him for \$4,000; "pay \$1,000 or less down, and you can have your own time to pay the balance by paying 8 per cent. interest."

The plaintiff also proved this letter of the defendant, dated 26th January, 1869:—

"Messrs Lemon and Peterson—In reply to yours of the 23rd, I will give \$3,100 for Taylor's house and lots, which is I think as much as they are worth in the present state they are in. However, you can let me know, and I will think over it, as I have been away since Taylor has been up here, and took no thought about the matter since.

Yours,

(Signed) WM. KNOWLES.

Also the following document, dated 29th January, 1869: "I will give the sum of \$3,500, together with the choice of one horse, waggon, and teaming harness, or buggy.

(Signed) WM. KNOWLES.

Accepted—R. Taylor." On the margin was written, "\$600 or more down, balance in three years or less, as may be agreed on, with interest at 8 per cent.

(Signed) WM. KNOWLES.

(Signed) R. TAYLOR.

It was shewn that under the agreement of the 29th January a conveyance from the plaintiff to defendant was made of the lands in question, and delivered to the defendant, and that the defendant executed a mortgage to the plaintiff; and other evidence was given to prove the count as laid.

On the part of the defence, witnesses were called merely to prove the value of the horse, &c., in question, and the learned Judge directed a verdict for the plaintiff for \$190.

It was objected by the defendant's counsel that no agreement in writing was proved, that there was no consideration shewn for the promise, and that the contract was one within the Statute of Frauds and void.

Leave was reserved to move to enter a nonsuit.

In the following term a rule *nisi* to enter a nonsuit in pursuance of the leave was granted, which, after argument, was discharged; the learned Judge in giving judgment, saying that he was quite satisfied that the allegations in the declaration were proved, and that the evidence was clear that the plaintiff's interest in the real estate passed to the defendant in pursuance of the agreement of the 29th January; and relying on the case of *Green v. Saddington*, 7 E. & B. 503, he upheld the verdict and discharged the rule. From this judgment the defendant appealed.

The case was argued during last Michaelmas term.

*S. Richards*, Q.C., for the appellant, cited *Boydell v. Drummond*, 11 East 142; *Leake* on Contracts, 101; *Cocking v. Ward*, 1 C. B. 858.

*Harrison*, Q. C., contra, cited *Kelly v. Webster*, 12 C. B. 283; *Cherry v. Heming*, 4 Ex. 631; *Green v. Saddington*, 7 E. & B. 503; *Lavery v. Turley*, 6 H. & N. 239; *Greenham v. Watt*, 25 U. C. R. 365; *Carscaden v. Shore*, 17 C. B. 493; *Phippen v. Hyland*, 19 C. P. 416; *Shadwell v. Shadwell*, 9 C. B. N. S. 173; *Wilkinson v. Evans*, L. R. 1 C. P. 407; *Reuss v. Picksley*, L. R. 1 Ex. 342; *Leney v. Taplin*, 21 L. T. Rep. N. S. 204.

The arguments of counsel sufficiently appear in the judgment.

MORRISON, J.—On the argument the contention of Mr. Richards was, that the contract upon which the plaintiff was suing was one within the statute of frauds: that the agreement upon which the plaintiff relied did not on its face shew any consideration, and was void: that the memorandum of the 29th January was not aided by the letter of the 26th January, without parol evidence, which he argued could not be allowed; and that the plaintiff could not recover. The plaintiff argued that there was a valid agreement shewn, taking the letter of the 26th January in connection with the memorandum of the 29th January, quite sufficient to satisfy the statute, and that at all events,

as the contract was fully executed on the part of the plaintiff, the learned Judge below was right in discharging the rule to enter a nonsuit.

I regret very much for the sake of justice that we must allow this appeal, for it is quite clear that the merits are altogether with the plaintiff. If we could see any ground upon which the verdict could be supported, we would sustain it.

The only count in the declaration is upon the agreement for the sale of the land, the consideration for which was a sum of money and the horse, &c., now sued for. The contract is entire, and, as said in *Hodgson v. Johnson*, E. B. & E. 690, here is only one contract and one consideration. The contract therefore must be sued upon as a whole, and taken as a whole, and though part of the contract has been performed by the defendant, the consideration remains entire, and such part performance does not enable the plaintiff to sue in respect of that part of the contract which on the defendant's part remains unperformed, for he has to prove the promise, and to do so gives in evidence the original and only agreement, and if that agreement is void by the Statute of Frauds he must fail.

\* I refer to the case of *Johnstone v. Cowan*, 25 U. C. R. 470, in which the principal cases bearing on this point are discussed. That decision is also an authority against the plaintiff.

The other question arising here is, whether the plaintiff proved an agreement sufficient to satisfy the statute. We think he has failed in doing so. The memorandum of the 29th January is of itself certainly not sufficient. It cannot be coupled with the letter of the 26th January addressed to Lemon and Peterson, so as to connect them, without resorting to parol testimony. There is nothing in the memorandum of the 29th January referring to the letter of the 26th, or to the lots and houses therein mentioned. If there had been in it any reference to the proposal to Messrs. Lemon and Peterson, or if it had referred to the letter of the 23rd January mentioned in it, so as to

connect them on their face, in all probability there would have been sufficient to enable the plaintiff to succeed; but as the memorandum of the 29th January now stands, without reference to any lands or proposal, it cannot be shewn as referring to the lands in question, and set out in the declaration, without parol evidence; and, as said in *Boydell v. Drummond*, 11 East 152, there is nothing to prevent the plaintiff from substituting any other consideration or lands, and saying they were the lands, &c., to which the memorandum related; and so the case falls within the Statute of Frauds, because the connection between the documents can only be made out by the intervention of parol evidence, and which in fact was the mode in which these papers were connected on this trial, and so leaving the door open to perjury, which it was the object of the statute to prevent.

The learned Judge below misconceived the effect of the case of *Green v. Saddington*, 7 E. & B. 503. In that case the interest in the land passed, but there the whole of the purchase money was paid also, and the contract respecting the land was executed on both sides; and, as said by Draper, C.J., in *Johnstone v. Cowan*, 25 U. C. R. 476, in referring to the case of *Green v. Saddington*, a separate promise to be performed after such execution would not be within the statute.

I am therefore of opinion that we must allow this appeal, and that the rule for entering a nonsuit in the Court below should be made absolute.

WILSON, J.—The claim in this case cannot be supported for the consideration of the land which was sold, unless by resorting to the contract which related to the sale of the land.

No action will lie without a writing sufficient to satisfy the Statute of Frauds: *Cocking v. Ward*, 1 C. B. 858; *Kelly v. Webster*, 12 C. B. 283; *Smart v. Harding*, 15 C. B. 652; and other later cases are to the same effect.

An account stated may be maintained for the price of land conveyed, although there was no contract in writing,

if there has been a subsequent accounting in respect of the price, or a subsequent verbal promise to pay it, which will be evidence of an account stated: *Cocking v. Ward*, 1 C. B. 858. There is no account stated in this declaration.

If there had been, and if the defendant had been found indebted to the plaintiff in the horse, waggon, and harness, the value of which was stated at a certain sum of money, it is very probable that a promise by the defendant to pay or deliver to the plaintiff the said articles on request would have been a good account stated.

A common *indebitatus* count is supportable for goods, the breach of which is stated to be that the defendant did not pay the goods, though he promised to do so: *The Earl of Falmouth v. Penrose*, 6 B. & C. 385.

There can be no objection, then, to the defendant accounting for and promising to pay on request that which may be the subject of debt or assumpsit on the common counts.

Upon such accounting for and in respect of goods, I think the defendant might promise to pay the value thereof in money, for the count would disclose that which would be a sufficient consideration for the promise: *Hopkins v. Logan*, 5 M. & W. 241.

There is no such account stated here.

The question then is, whether there is or not a sufficient writing between the parties to support the action.

That depends on whether the instruments can be or are sufficiently connected by reference one to the other in any respect to permit them to be used as parcel of the same contract?

The first letter is the one from the plaintiff to the defendant, dated 9th January, 1869, referring particularly to the property. It is, among other things, stated: "I will let it go to you for \$4,000. Pay \$1,000 or less down, and you can have your own time to pay the balance, by paying 8 per cent. interest."

The next is one from defendant to Messrs. Lemon and Peterson, professional gentlemen at Guelph, who were no doubt acting for the plaintiff, dated 26th January, 1869.

Defendant says: "In reply to yours of 23rd (which letter was not produced) I will give \$3,100 for Taylor's house and lots \* \* However you can let me know, and I will think over it. \* \*"

The third letter is from defendant to plaintiff. It is dated 29th January, 1869. It is: "I will give the sum of \$3,500, together with the choice of one horse and waggon, and teaming harness, or buggy." The words are added: "Accepted.—R. TAYLOR;" and also, "\$600 or more down, balance in three years or less, as may be agreed on, with interest at 8 per cent. (Signed) "WM. KNOWLES.  
" "R. TAYLOR."

It will be necessary to see exactly what has and what has not been considered to be a sufficient connection between separate writings.

In *Boydell v. Drummond*, 11 East 142, there was a prospectus published of the work intended to be issued. It stated that the work was to be published *by subscription*, and to be executed by certain artists from the most striking scenes of *Shakespeare*. The subscription book was entitled "*Shakespeare subscribers, their signatures.*" The defendant afterwards wrote to the plaintiff, stating that "he ceased taking in the numbers of the *Boydell Shakespeare* many years ago," &c. The plaintiff had given the defendant a receipt for one guinea as the second subscription to the first number of the *Shakespeare*, and for two guineas as the first subscription to the second number, "*agreeable to the original proposals.*" Copies of the prospectus were lying about in the place where the defendant subscribed, and some parts of the work had been delivered to, and accepted by defendant. But the Court held that the prospectus could not be connected with the book of subscriptions without parol testimony, and that the defendant's letter, though it spoke of the *Boydell Shakespeare* and of his *engagement* with the proprietors, did not refer to the prospectus, nor could it be shewn to refer to the engagement contained in the prospectus without parol testimony; and that there was nothing to prevent the

plaintiff from substituting any prospectus, and saying that it was the prospectus exhibited in his shop at the time to which the signature related.

In *Crane v. Powell*, L. R. 4 C. P. 123, the respondent applied to the "Free Labour Registration Society" for some workmen. He filled up and signed an application, stating his address as employer at "Brook Hill, Sheffield." The appellant called at the Free Labour office, and respondent's letters were read to him, and also his application, and the appellant signed a memorandum to the effect that, "having accepted employment in Sheffield, I do agree," &c., "and that I will not quit the service of my employer," &c. Willes, J., in giving judgment, said: "From the first letter it appears that the respondent applied to the 'Free Labour Registration Society' to procure him some workmen. The secretary to the Society wrote in answer, inclosing a blank form, which shewed under various heads the details of the employment; that was filled up and signed by the respondent; the form was headed, 'To be filled up by employers requiring hands from the Free Labour Registration Society,' and it was signed, 'signature of employer, J. Powell. Address of employer, Brook Hill, Sheffield. That being so, the document was brought to the knowledge of the appellant; and the question is, whether it was assented to by a writing referring to it, and signed by the appellant. Now, the document signed by the appellant stated that he had accepted employment at Sheffield, the place where, as appears by the other document, the respondent lives, and it contains the expression 'being the fee to the said society for obtaining us the said employment,' and 'we do also agree that we will not quit the service of our employer,' referring especially to some employment found for the appellant by the society. Upon enquiring what was the employment procured for the appellant by the society, which we are thus led to do by the document itself, it appears to have been in writing and contained in the form filled up and signed by the respondent; a complete

contract in writing, signed by the two parties, is therefore obtained." See also *Horsey v. Graham*, L. R. 5 C. P. 9.

The consideration of these cases leads me to the conclusion that no sufficient connection can be made between the letters produced. The last one does not in any one respect refer to the previous letters. If it had said, "In reference to my letter of the 23rd instant," or, "instead of \$3,100, which I before offered you," or "about your lot," "I will give \$3,500," it would probably be held to have referred to and recognized the letter of the 23rd. But certainly if ever a letter did require verbal testimony to connect it with a previous one, this letter requires it, for it is perfectly unintelligible as it now stands. What is he to give it for?

The party must therefore fail at law, and will be compelled to resort to equity to have a lien established on the land for the balance of his purchase money.

It appears very hard the law should be so contracted by statute, that when the vendee has got the land he should not be compellable to pay the price of it without an indirect proceeding in equity, and which may probably be abortive if the vendee get rid of the land before the lien can be established.

RICHARDS, C.J., having been absent during the argument, gave no judgment.

*Appeal allowed.*

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## HARTMAN V. FLEMING ET AL.

*Deed—Construction—Reservation of life estate.*

H., by deed poll, in consideration of natural love and affection and of 5s., conveyed land to her daughter, R., in fee, adding after the *habendum*, "Reserving, nevertheless, to my own use, benefit and behoof, the occupation, rents, issues, and profits of the said above granted premises for and during the term of my natural life."

*Held*, that this reservation was not void, but that the deed might be construed as a covenant to stand seised of the reversion to the use of R., the life estate remaining in H.

EJECTMENT for the west-half of the east-half of lot 26 in the first concession of the township of Ernestown.

The plaintiff claimed title by length of possession in himself and one Margaret Hartman, through whom he claimed by deed from Margaret Hartman to him.

The defendants denied the plaintiff's title, and asserted title in themselves; the defendants Simpson and Wycott under a deed in fee, dated 6th February, 1868, from one Henry Simmons to them, and the defendant Fleming as the tenant of his co-defendants.

The cause was tried at the last Fall Assizes, at Napanee, before Morrison, J., when a verdict was rendered for the plaintiff, with leave to the defendants to move for a non-suit or verdict to be entered for them on the objections taken at the trial, if the Court should be of opinion the objections were entitled to prevail.

The facts appeared to be, that Margaret Hartman, by deed poll, on the 27th February, 1843, granted the land, or the reversion, to her daughter, Rosina Gaylord. Luther Gaylord, and Rosina, his wife, on the 8th of May, 1843, conveyed the land, for valuable consideration, to Henry Simmons, in fee; and Simmons, on the 6th February, 1868, conveyed to two of the defendants, Simpson and Wycott, for valuable consideration, in fee. This was the defendants' title.

The plaintiff, beside his possessory title, had a deed also from Margaret Hartman to him of this land, dated 12th June, 1850.

The deed of the 27th February, 1843, on which the case turned, was as follows: "Know all men by these presents, that I, Margaret Hartman, of, &c., widow, for the consideration of the love and natural affection which I have and bear unto my daughter Rosina Gaylord, wife of Luther Gaylord, of, &c., and for the further consideration of the sum of five shillings, to me in hand paid, &c., have given, granted, bargained, sold, assigned, released, transferred, conveyed, and confirmed, and by these presents do give, &c., unto the said Rosina Gaylord, her heirs and assigns, all that certain tract or parcel of land, &c., to have and to hold the said granted premises, with all the privileges and appurtenances thereof, to her, the said Rosina Gaylord, her heirs and assigns, to their own use for ever; reserving, nevertheless, to my own use, benefit and behoof, the occupation, rents, issues, and profits of the said above granted premises, for and during the term of my natural life. In testimony whereof," &c.

In Michaelmas Term last, *Crooks*, Q.C., obtained a rule calling on the plaintiff to shew cause why a nonsuit should not be entered, on the following grounds:—

1. That the plaintiff failed to shew any title to recover.
2. That by the deed from Margaret Hartman to Rosina Gaylord a life estate, or other interest to continue for her life, was well reserved to Margaret Hartman, and no title founded on possession could begin to accrue to the plaintiff, or those through whom he claimed, till after the determination of that life estate.
3. That such last-mentioned deed operated (if not otherwise) at least as a covenant to stand seized to the use of Margaret Hartman for her life, and consequently created in her a life estate in the said land, or as a covenant to stand seized as to the remainder to the use of Rosina Gaylord and her heirs.
4. That, consequently, Rosina Gaylord, and those who claim through her, were not entitled to possession until Margaret Hartman's death, and that any possessory inter-

est of the plaintiff would then first begin to accrue, under the Statute of Limitations with respect to real estate.

5. That during the coverture of Rosina Gaylord, the Statute of Limitations did not begin to run in favour of the plaintiff.

In Hilary Term last, *Britton* shewed cause. The deed from Margaret Hartman to Rosina Gaylord, her daughter, is in fee, and the reservation of the life estate to herself is void: *Smith's* R. P. 624-628 (ed. 1865); *Shep. Touch.* 79; *Leith's* Black. Com. 262-266; *Grant v. McLennan*, 16 C. P. 395. Rosina Gaylord, notwithstanding this reservation, was entitled to the immediate possession of the land; and if this be so, the plaintiff's title by length of possession is complete: Consol. Stat. U. C. ch. 88, sec. 2, sub-sec. 3.

*Crooks*, Q.C., supported the rule. The reservation in the deed will be read in such a manner with the whole context, and will be so construed according to its object and the intent of the parties, as to give every part of it full effect, if that be possible. No part of it will be rejected if a meaning and purpose can be given to it. The deed from Margaret Hartman to Rosina Gaylord shews plainly the grantor meant to retain an estate in the land for her own life, and to grant the reversion only to Rosina Gaylord, her daughter. The deed was a voluntary one, founded on natural love and affection, and the nominal consideration of 5s. The deed, therefore, will be read so as to carry out this plainly expressed intention. This may be done by treating the deed as a covenant to stand seised, and the following authorities will shew this may be done: *Squire v. Ford*, 9 Hare 47; 4 Com. Dig. 115-116, 256-257; *Burton's* R. P. 172, 173; *Roe d. Wilkinson v. Tranmarr*, 2 Sm. L. C. 474; S. C., 2 Wils. 75, Willes 632; *Broom's* Leg. Max., 4th ed., 522; 2 Saund. on Uses, 79; *Doe d. Milburne v. Simpson*, 2 Wils. 22; *Chester v. Willan*, 2 Wms. Saund. 96, note (i); *Doe d. Dyke v. Whittingham*, 4 Taunt. 20; *Doe d. Lewis v. Davies*, 2 M. & W. 503, 511.

WILSON, J.—The defendants' title from Margaret Hartman, being the earlier one, must prevail against the later one to the plaintiff.

The plaintiff's only ground of resistance then to the earlier deed is by reason of his length of possession; but that possession is of no service to him, as Mrs. Hartman was, in conjunction with the plaintiff, all along in the actual occupation of the farm, and she died only about 1865, unless the reservation in her deed to Rosina Gaylord of the life estate is void.

If it be not void, that is, if her deed to Rosina Gaylord can be construed to be a covenant to stand seised to the use of Rosina of the reversion, the life estate remaining in Mrs. Hartman for her own use during her life, then there was no possession in the plaintiff to defeat Mrs. Hartman's interest. He had no possession at any time as against her, unless from the date of his deed in 1850 till her death, at which time he had a title as against her; but that title determined with her life in 1865.

The whole question is, whether the deed of Mrs. Hartman of the 27th February, 1843, can be construed as the defendants contend for. If it can, the defendants must succeed; if it cannot, the plaintiff will succeed by reason of his length of possession.

It is one of the rules of construction applicable to all documents, "that too much regard is not to be had to the natural and proper signification of words and sentences to prevent the simple intention of the parties from taking effect; for that the law is not nice in grants, and therefore it doth often transpose words contrary to their order, to bring them to the intent of the parties;" and that "the first thing we ought to inquire into is, what was the intention of the parties. \* \* \* If the intent of the parties be plain and clear, we ought, if possible, to put such a construction on the doubtful words of a deed as will best answer the intention of the parties, and reject that construction which manifestly tends to overturn and destroy it:" per Willes, C. J., in *Parkhurst v. Smith dem. Dormer*, Willes 332.

These rules and maxims are said to have been collected from Littleton, Plowden, Coke, Hobart, and Finch, and they are as much in force now as they ever were. "They are themselves so full of justice and good sense, that they do not want any authority to support them, and I do not know that they were ever yet controverted:" *Ibid.*

*Squire v. Ford*, 9 Hare 47; *Solly v. Forbes*, 2 B. & B. 38; *Ford v. Beech*, 11 Q. B. 852, and many others which might be added, are illustrations of the correctness and application of these rules.

It is quite true that where there is a gift with a condition inconsistent with and repugnant to it, the condition is void; and it is very true that the clause in question cannot strictly be treated as a *reservation*, which cannot be of any part of the subject granted, but must be of some rent-service, profit, or easement issuing out of, or arising in respect of the subject.

The rule relied on by the plaintiff arises where the deed must either operate without regard to the condition or not operate at all, and to prevent an utter failure of the deed the condition is rejected. But the rule relied on by the defendants is, that when a deed can operate in two ways, one consistent with the intent, the other repugnant to it, the Court will construe it so as to give effect to the intent, putting the construction on the entire deed. *Solly v. Forbes*, 2 B. & B. 48; *Roe v. Tranmarr*, Willes 682; *Ford v. Beech*, 11 Q. B. 852; and the many cases collected in the notes to *Chester v. Willan*, 2 Saund. 96, and the following pages, are instances of the application of this rule.

This clause may therefore, if necessary, be transposed, because the intent is apparent that the grantor designed to retain a life estate, and to dispose of the reversion only.

The question then is, can the conveyance be read as if the grantor had reserved such life estate, or covenanted to stand seised of it to herself, and had covenanted further to stand seised of the reversion to her daughter in fee?

The case nearest to it which I have found is *Foster v.*

*Foster*, 1 Lev. 55. There a deed was made between the mother and her son in this manner: "Articles of agreement for conveyance of, &c., (the tenements in question.) Imprimis, the said Margery, in consideration of £20, hath bargained and sold, demised and granted, and doth bargain, &c., to Matthew Foster the tenements in question, to have and to hold to him and his heirs for ever; she to have it during her life, and also she to have his barn during her life, for her third part," &c. The jury found that the articles were made as well in consideration of natural affection as of £20, but no execution by livery or enrolment. She afterwards made a feoffment of the lands to Nicholas Foster, the defendant, against whom Matthew brought this ejectment.

The question was, whether those articles amounted to a covenant to stand seised to the use of Matthew; and it was, after argument, adjudged for the defendant that the articles did not raise any use, but rested only in covenant, and as preparatory agreements: "First, from the title, namely, articles, &c. Secondly, *she to have all for her life*, which is but an agreement she should have it. Thirdly, *that she should have his barn*: this rests only on covenant, and if the estate should pass to her by way of use, and she have covenant only for the barn, it would be unequal."

In *Sid.* 82, the same case is reported, and it is said the deed was held void, because the intent of the parties was that it should not operate by way of use, but that it should only be as articles of covenant and agreement, and that no particular estate could be reserved to the one parting with his estate, and for this cause the deed to the eldest son was void.

In 1 *Keble* it is reported in four places, pp. 160, 226, 274, 319. In p. 226 the Judges thought the reservation of the particular estate void. In p. 274 the Judges agree in this, that the intent appeared the deed should not pass by way of use, though they express themselves differently. In p. 319, Windham, J., was of opinion there was no

intention to convey at common law or by way of use, for the articles were only of agreement referring to a future conveyance, and that, as in *Pitfield v. Pierce*, March 50, the grantor did not intend to take an estate for life, punishable for waste at the will of her son, but to have an estate "unsubjected to waste;" and he said, "no difference being betwixt a demise after my death and a reservation to me during life," so *Pitfield's* case was unanswerable.

Twisden, J., said: "And take this (she reserving) as a reservation, or condition, or exception, it is repugnant to the deed, had it been executed as a feoffment; and so this conveyance being void in the fabric shall not be supported as a covenant to stand seised."

*Pitfield v. Pierce*, March 50, is to the same effect, Rolle, J., being of opinion that a gift of the remainder after the death of grantor was void. Twisden, J., was of opinion the deed was good as a covenant to stand seised.

In *Callard v. Callard*, Cro. Eliz. 344, Poph. 47, the grantor, being seised in fee, in consideration of a marriage of his son Eustace, said these words to his son, upon the land: "Eustace, stand forth: I do here, *reserving an estate for my own and my wife's life*, give thee these my lands, and Barton, to thee and thy heirs." The Queen's Bench held this a good conveyance, though on very unsatisfactory contradictory reasons assigned by the Judges. But it was reversed in the Exchequer Chamber, on the ground that a use could not be declared without a deed.

It is quite clear that a covenant to stand seised may be *in futuro*, which is the very point of decision in *Roe v. Tranmarr*, and after an estate for life reserved to the grantor, thus reversing the decision even of the House of Lords in *Samon v. Jones*, 2 Ventr. 319; and this life or preceding estate may arise by implication: *Pybus v. Mitford*, 1 Ventr. 372.

In *Carter v. Kungstead*, Owen 84, Periam, J., said: "If a man covenants upon consideration to be seised to the use of himself for life, and after to the use of his son,

but he further says that his meaning is his wife shall have it for her life, this is not a void clause, but good to the wife."

If the clause in the deed under consideration is operative at all, it is, according to Cro. Eliz. 345, in its proper place after the *habendum*, for an exception was taken in that case that the words reservant preceded instead of followed the *habendum*, but it was held sufficient, "for the law shall marshal it according to the intent."

The case of *Crossing v. Scudamore*, 1 Vent. 137, shews how the cases of *Foster v. Foster* and *Pitfield v. Pierce* were then considered to have been decided.

I now refer to *Roe v. Tranmarr*, which shews that all previously decided cases which determined that the grantor could not reserve an estate for life to himself, or could not grant a freehold *in futuro* by a covenant to stand seised, are expressly overruled; and to the case of *Doe dem. Lewis v. Davies*, 2 M. & W. 503, in which the Court of Exchequer, in accordance with what was said in *Roe v. Tranmarr*, Willes 682, decided that a covenant with a stranger that he should stand seised to the use of those who were within the benefit of the consideration was valid, thus overruling, as the case of *Roe v. Tranmarr* virtually had done, all the older decisions to the contrary.

I am of opinion that this deed from Margaret Hartman to Rosina Gaylord, her daughter, may, to give effect to the plain intent of the parties, be regarded as a covenant to stand seised, and that the clause of reservation stands in its proper place after the *habendum*, and that the reservation may be construed just as if it had been part of the *habendum*, in which case the conveyance would have been to Rosina Gaylord in fee, after the death of the grantor, for, as already stated, there is "no difference between a demise after my death and a reservation to me during life."

There was something mentioned as to registration, but it was not relied on. It was admitted if this reservation were good the defendants must succeed, and I think it is good.

The rule must therefore be made absolute to enter a nonsuit.

MORRISON, J., concurred.

RICHARDS, C. J., having been absent during the argument, gave no judgment.

*Rule absolute.*

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CARR ET AL. V. TANNAHILL ET AL.

*Agreement—Champerty and maintenance.*

The plaintiffs having filed a bill for specific performance of a contract by one R. to sell a certain mine to them, it was agreed between the plaintiffs and T., one of the now defendants, while such suit was pending, that certain persons, should purchase said mine from the plaintiffs: that they should deposit the money required for security for costs, which the plaintiffs had been ordered to give in said suit, and pay all costs incurred or to be incurred therein, or any other suit brought or defended by them respecting said mine, and pay all moneys due for the purchase thereof, and allot to each of the plaintiffs a twentieth share therein, if they should succeed in getting a title through the suit; and that they would settle all claims of Messrs. E. & G. against the plaintiffs.

The plaintiffs having sued defendants on the last mentioned covenant, *Held*, upon demurrer to a plea setting out the transaction, that the agreement was void for champerty and maintenance, and they therefore could not recover.

The plaintiffs replied to the plea on equitable grounds, that in the Chancery suit defendants were added as plaintiffs, and defendants therein in their answer set up against them that this agreement was void for champerty, which they denied, and on the bearing the cause was compromised, and a decree made by agreement by which defendants were allotted a certain portion of the land, for which they received a conveyance, and the agreement declared on was treated and acted upon by all parties and treated by the Court as valid. Remarks by Wilson, J., as to the effect of this replication.

DECLARATION on defendants' covenant to settle any claims of William W. Elmer and Robert Gray against the plaintiffs in relation to a certain mine, called the Richardson mine, averring that said Elmer and Gray recovered judgments against the plaintiffs, which defendants had not paid.

Plea,—that before the making of the unlawful agreement hereinafter mentioned, the said plaintiffs filed their

bill of complaint in the Court of Chancery for the Province of Ontario against one John Richardson, Alfred Austee, C. Nicholls, and James St. Charles, to compel the said John Richardson to specifically perform a certain agreement made between the said Richardson and the plaintiffs for the sale by the said Richardson to the plaintiffs of all the ores and minerals whatsoever in, upon, or under certain lands and premises situate in the township of Madoc, in the County of Hastings, being a part of the east half of lot number eighteen in the fifth concession of the said township of Madoc, comprising about twenty acres of land, more or less, particularly described in said bill, on payment by the said plaintiffs to the said Richardson of the sum of \$20,000 of lawful money of Canada, on which said land and premises was situated what was then and since known as "The Richardson Gold Mine;" and that a certain other agreement made between the said Richardson and the said other defendants in said Chancery suit might be declared void and given up to be cancelled: that after the filing of the said bill of complaint, and while the said suit was pending and in progress, and being prosecuted by the plaintiffs against the said John Richardson for the said specific performance as aforesaid, such proceedings were had and taken that the said plaintiffs were ordered and compelled to give security for the costs of the said John Richardson incurred by him in his defence to the said bill of complaint: that after the filing of the said bill of complaint, and while the said suit was being prosecuted by the plaintiffs against the said Richardson and the said other defendants therein as aforesaid, it was wrongfully and unlawfully agreed by and between the plaintiffs and the defendant Robert Tannahill, amongst other things, that certain persons designated in the same unlawful agreement subscribers and stockholders in Belleville, should purchase from the plaintiffs the said Richardson Gold Mine, respecting which the said suit was then pending, and in or to which they had before then no title or claim, at the sum of \$40,000, made up as in the said agreement hereinafter

mentioned; and it was further agreed that they should deposit the money required for security for costs in the said suit, and should pay all moneys to the solicitors of the said plaintiffs in the said suit, being the plaintiffs in this suit, for carrying on the said suit in Chancery then pending, with all retaining fees and costs and expenses due on account of said suit, and should attend to the prosecution of the said suit, or any other suits that might be brought or defended by them in or about, touching or concerning the said mine, and would pay the costs thereof; and further, would raise the money and pay all sums due to the said Richardson and one Powell for the purchase of said mine; and it was further thereby agreed that the said plaintiffs should have an interest of one-twentieth part each in the said property free of costs or expense to them, provided the issue of the said Chancery suit, or any suits or arrangements, should give to said plaintiffs a good title and conveyance from said Richardson and Powell to said mine. And the defendants say that the said unlawful and corrupt agreement was reduced to writing, signed, sealed, and executed under the hands and seals of the said plaintiffs and the said defendant Robert Tannahill, and is in the words following, that is to say:—

“This agreement made this first day of February, 1867, by and between Joseph Flagg Carr and Earle W. Johnson of Boston, in the State of Massachusetts, gentlemen, and Robert Tannahill of Belleville, in the County of Hastings, and Province of Canada West, and other gentlemen in Belleville aforesaid, who may become parties to this agreement in reference to the Richardson Gold Mine.

“1. The subscribers and stockholders in Belleville are to purchase said mine at the round sum of \$40,000, to be made up as hereinafter mentioned.

“2. Said subscribers and stockholders are to deposit the money required for security for costs in Court, and to pay all moneys to the solicitors of said Carr and Johnson for carrying on the suit in Chancery now pending, with all the retaining fees and costs and expenses due on account of said suit not now paid, and to attend to the prosecution of said suit, or any suits that may be brought or defended by them in or about said mine, and to pay the costs thereof.

“3. Said subscribers and stockholders are to raise the money and pay all sums due and payable to one Richardson and Powell for the purchase of said mine, and the mining rights thereof, and to allot to said Carr and Johnson the sum of \$2,000 each, of paid up stock, being in all the

sum of \$4,000 of paid up stock (at a basis or valuation of \$40,000 for all said stocks or said property), and at the same ratio if said property should be put into a corporation or joint stock company (it being understood that said Carr and Johnson are to have an interest of one-twentieth part each in said property, free of costs or expense to them) in said mine: provided the issue of the Chancery suit, or any suits or arrangements, give to the said Carr and Johnson a good title and conveyance from Richardson and Powell to said mine.

"4. Said subscribers and stockholders are to settle any claims or supposed claims that one Dr. William W. Elmer and Robert Gray, of Madoc, in said County of Hastings, have or pretended to have against said Carr and Johnson, at such compromise as may be effected.

"5. Said Carr and Johnson authorize their solicitors, Messrs. Diamond and Dickson, to carry out this arrangement, and agree to sign any deeds or documents which may be necessary to convey their interest in said mine, and to carry out this arrangement.

"6. This agreement is to be null and void unless accepted by said Tannahill and others within thirty days from the date first above written, and notice thereof given to said Carr and Johnson, and in case this proposition is so accepted by said Tannahill and others they agree to do all acts and things herein stipulated for them to do, and to make and execute on their part all papers or documents necessary to carry out their part of this agreement, or binding them so to carry it out.

"Witness the hands and seals of the parties the day and year first above written.

(Signed) "JOSEPH FLAGG CARR. [L S.]

" "EARL W. JOHNSON. [L.S.]

" "ROBERT TANNAHILL. [L.S.]

"In presence of

(Signed) "JOHN SALMON."

That the suit in Chancery mentioned in the said illegal agreement was and is the same suit mentioned in the plea, and was pending at the time of the making of the said unlawful agreement; and that the said Richardson mine mentioned in the declaration in this cause was and is the same Richardson Gold Mine mentioned in said unlawful agreement aforesaid, and that the said Robert Tannahill before and at the time of the making of the said unlawful agreement was not, nor were the said subscribers and stockholders, or the defendants, or any of them, entitled to or interested in the said Richardson Gold Mine, or the property the subject matter of the said Chancery suit; and further, that it is by the above recited agreement that the plaintiffs allege that the defendants covenanted as in the declaration alleged, which said agreement defendants say was and is the deed in the declaration mentioned. And the

defendants further say that the said deed was an agreement for the prosecution and carrying on of the said Chancery suit then pending by the purchaser at the costs and charges of the purchaser, and not of the plaintiffs, with a provision, as part of the consideration for so doing, for a division of the subject matter of the said Chancery suit between the said purchaser and the plaintiffs in case of success, free of costs and expenses of said suit to the plaintiffs, and was and is void in law.

The plaintiff demurred to this plea, on the ground that it was not alleged that in the making of the agreement any of the parties acted with a corrupt or improper motive: that the agreement neither amounted to champerty nor maintenance, nor was otherwise illegal; and that the plea was in confession and avoidance as to defendant Tannahill only, while it purported to be the joint plea of all.

There was also a replication on equitable grounds, that the said bill of complaint was amended, and the defendants, with others, known as the said "subscribers and stockholders in Belleville," in the declaration mentioned, were added as parties, plaintiffs, and the defendants therein by their answer set up as against the present defendants and others aforesaid that the agreement now declared on and set out in said plea was bad and void for champerty, which was denied by the now defendants and others aforesaid, whereupon the cause came on for hearing, and was compromised by the parties to said suit, and a decree was made by the said Court of Chancery in pursuance of their agreement, by which decree the said defendants were allotted, with the others, the "subscribers and stockholders in Belleville" aforesaid, certain portions of the land mentioned in said agreement, and by virtue thereof, and certain other benefits thereunder, and certain conveyances were executed under said decree securing the same to them, which they also accepted, and the said agreement declared on was treated and acted upon by all the parties as a good and valid agreement in law, and was so recognized by the said Court of Chancery by the said decree, and the lands to

which the said defendants so became entitled as aforesaid were the same which the said E. and G. procured a bond therefor to the plaintiffs from the said John Richardson, as stated in the declaration. And the plaintiffs further allege that the said agreement set out in the said plea was made and entered into by the plaintiffs with the defendants in the United States of America, they then being subjects of that country, domiciled there.

To this replication the defendants demurred.

*J. H. Cameron, Q.C.*, for the demurrer, cited *Williams v. Protheroe*, 3 Y. & J. 129, 5 Bing. 300; *Stevens v. Bagwell*, 15 Ves. 139; *Wood v. Downes*, 18 Ves. 128; *Wood v. Griffith*, 1 Swanst. 56; *Vin. Ab.*, *Hawk. P. C.*, *Com. Dig.*, Title "Maintenance."

*Bell, Q.C.*, (of Belleville) contra, cited *Reynell v. Sprye*, 8 Hare 222; *Kerr v. Brunton*, 24 U. C. R. 390; *Hilton v. Woods*, L. R. 4 Eq. 432; *DeHoghton v. Money*, L. R. 2 Ch. App. 164; *Stanley v. Jones*, 7 Bing. 369.

MORRISON, J.—I am of opinion that our judgment should be for the defendants on the demurrer to the plea.

The bargain which the pleadings disclose amounts to this:—the defendants agreed with the plaintiffs to purchase from the plaintiffs certain mining property, the right to such property at the time of such bargain being the subject of a Chancery suit then pending against the parties therein named to compel specific performance of an alleged sale of such property to the plaintiffs, the defendants agreeing, for the purpose of the maintenance of such suit, to provide and deposit in the Court of Chancery a sum sufficient to answer the costs of the defendants in the Chancery suit, and to pay all costs to the plaintiffs' solicitors for carrying on the suit in Chancery, and all retaining fees and costs then due and not paid, and to attend to the prosecuting of the suit, or any suits that might be brought or defended by them respecting such property, and to pay the costs thereof; the agreement further providing, that if the

Chancery suit, or any such suits, gave to the plaintiffs a good title or conveyance to the mining property, that the property so recovered should be divided in such a manner as to give to the plaintiffs one-tenth part of the same.

In the case of *Williams v. Protheroe*, 3 Y. & J. 129, cited by the plaintiffs, Best, L. C. J., says: "Champerty is, according to the definition of Lord Coke, a bargain with the demandant or tenant, plaintiff or defendant, to have part of the thing in suit, if he prevail therein, for maintenance of this or that suit."

And Lord Loughborough, in *Wallis v. The Duke of Portland*, 3 Ves. Jun. 502, after referring to Hawkins, P. C., says: "Statutes prohibiting particular species of maintenance add penalties; but it is laid down as a fundamental authority, that maintenance is not *malum prohibitum*, but *malum in se*: that parties shall not by their countenance aid the prosecution of suits of any kind; which every person must bring upon his own bottom, and at his own expense. There is no case in contradiction to this."

And Tindal, C. J., in *Stanley v. Jones*, 7 Bing. 369, in giving judgment says: "The offence of champerty is defined in the old books to be the unlawful maintenance of a suit in consideration of some bargain to have part of the thing in dispute, or some profit out of it. That this was considered in earlier times, and in all countries, an offence pregnant with great mischief to the public, is evident from the provisions made by our own law in the statutes Westminster first and second, and from the language of the civil law, which was afterwards received as the law over the greater part of the continent. The object of the law was not so much to prevent the purchase or assignment of a matter then in litigation, as the purchase or assignment of a matter in litigation for the purpose of maintaining the action, as is evident from Lord Coke's reading on Stat. West. 2, ch. 49, \* \* evidently pointing to the distinction, that the offence of champerty consisted in purchasing

an interest in the thing in dispute, with the object of maintaining and taking part in the litigation; and we see no reason to doubt that the offence of champerty, in this restricted sense, remains the same as heretofore."

And so in the case of *Prosser v. Edmonds*, 1 Y. & C. at page 497, the Lord Chief Baron says: "All our cases of maintenance and champerty are founded on the principle that no encouragement should be given to litigation by the introduction of parties to enforce those rights which others are not disposed to enforce. There are many cases where the acts charged may not amount precisely to maintenance or champerty, yet of which upon general principles, and by analogy to such acts, a court of equity will discourage the practice." And after referring to the case of *Wood v. Downes*, cited by the plaintiffs' counsel in this case, and the judgment of Lord Eldon, Lord Abinger proceeds: "Here the proceeding is the converse of that in *Wood v. Downes*. It is not to set aside the conveyance in question, but to establish it. The principle is the same in both cases; for if, under the circumstances, Robert Todd had filed his bill against the plaintiffs, I should have declared it to be a void deed, and should have ordered it to be set aside. Upon the same facts, therefore, I ought to refuse to establish the deed in their favour." And at the end of his judgment he says: "Upon these principles it appears to me that is a case of a purchase of a litigated title. Many cases are to be found to the effect, that where the title is actually in litigation, an agreement to divide the subject of dispute is not available in equity. But the policy of the law is not confined to those cases only."

I refer to this authority as well for the general principle and rule of law, and as being applicable to this case in another point of view. Here the plaintiffs are the parties whose litigated title was bargained for, and are seeking to enforce the contract, and the case cited shews that the principle is the same whether the plaintiff in a cause is seeking to enforce such a contract or to set it aside.

The latest case bearing on the subject is that of *Hilton v. Woods*, L. R. 4 Eq. 433. That was a case relating to coal mines. One Wright, a solicitor, asked the plaintiff if he was aware that he was entitled to the coal mines. The plaintiff expressed his doubt as to his title, when Wright said he was so clear that he would guarantee him against any costs. A verbal arrangement was made to the effect that, in consideration of such guarantee, Wright should have a portion of the value of the property, that is, whatever he should make of it. It was there contended that the bargain amounted to champerty and maintenance, and that the suit instituted by the plaintiff Wright under such circumstances should fail. Sir R. Malins, V. C., said: "I have carefully examined all the authorities which were referred to in support of this argument, and they clearly establish that whenever the right of the plaintiff, in respect of which he sues, is derived under a title founded in champerty or maintenance, his suit will on that account necessarily fail. \* \* \* It is clear that the bargain between the plaintiff and Mr. Wright amounted to maintenance, and if the latter had been the plaintiff, suing by virtue of a title claimed under that contract, it would have been my duty to dismiss his bill." And the learned Vice Chancellor refers to various cases cited in his judgment, among others that of *Sprye v. Porter*, 7 E. & B. 58.

There the plea was demurred to, as here. In that case the parties did not contract to pay or indemnify against costs, or to carry on the litigation, but agreed, in consideration of receiving a tenth of the property, to furnish information and supply the evidence; and Lord Campbell, C. J., after holding that the agreement set out in the declaration did not amount to champerty, says: "But when we come to the pleas demurred to, we think it equally clear that, giving credit to their allegations, they shew the agreement to be illegal. There can be no doubt that the defendant is at liberty to allege that the written agreement declared upon was merely colourable, and to disclose as a defence the real nature of the transaction." And

after referring to the allegations in the plea, he says : " The plaintiff purchases an interest in the property in dispute, bargaining for litigation to recover it, and undertakes to maintain the defendant in the suit in a manner of all others the most likely to lead to perjury, and to a perversion of justice. Upon principle, such an agreement is clearly illegal, and *Stanley v. Jones*, 7 Bing. 369, is an express authority to this effect."

And Mr. Story, in his work on Equity Jurisprudence, Vol. II., secs. 1049, 1050, after in the previous sections referring to the doctrine of the common law as to champerty and maintenance, says : " But still Courts of Equity are ever solicitous to enforce all the principles of law respecting champerty and maintenance ; and they will not in any case uphold an assignment which involves any such offensive ingredients. Thus, for instance, Courts of Equity, equally with Courts of Law, will repudiate any agreement or assignment made between a creditor and a third person, to maintain a suit of the former, so that they may share the profits resulting from the success of the suit ; for it will be a clear case of champerty." And after referring to some examples he proceeds, in sec. 1050 ; " But, consistently with these principles, a party may purchase, by assignment, the whole interest of another in a contract or security, or other property, which is in litigation, provided there be nothing in the contract which savors of maintenance ; that is, provided he does not undertake to pay any costs or make any advances beyond the mere support of the exclusive interest, which he has so acquired."

In my opinion the agreement before us comes within the principles laid down in the cases and authorities referred to. It contains all the ingredients which are obnoxious to public policy, and which constitute maintenance and champerty. It contains an undertaking to remove an impediment in the way of proceeding with the suit in question by paying into Court the money required as security for the defendants' costs. It further provides for the payment of all the costs then incurred, and for all

future costs in that suit, or in any other suit necessary to be brought or defended respecting the subject matter, and also that the defendants shall attend to the prosecution of the suit; and it further provides for a division of the property in the event of the suit being favourable, viz., that the plaintiff shall be entitled to receive one-tenth part, and the defendants and their associates nine-tenths.

During the argument it was said that in modern times the law relating to maintenance has been relaxed in its application. No doubt the former strict rule of law in some instances is perhaps inapplicable to the present state of society, but upon examination of the latest decisions the early law and principles are still recognized and adhered to. It seems to me if we were to hold that the agreement under discussion was not one tainted with maintenance and champerty we would virtually ignore all the principles upon which the previous decisions proceeded. I see no ground upon which the purchase of a disputed right upon such terms as this agreement and the allegations in the plea disclose should be sanctioned.

It is true, as said by Mr. Story, (2 Equ. Jur. sec. 1054): "There is no principle in equity which prevents a creditor from assigning his interest in a debt after the institution of a suit therefor, as being within the statutes against champerty and maintenance. Such an assignment gives the person to whom it is made a right to institute a new proceeding, in order to obtain the benefit of the assignment, and the proper mode of doing this is by the assignee filing a supplemental bill (if the suit is still pending) making the assignor and the debtor defendants. But if the assignment contains an agreement that the assignee is to indemnify the assignor, not only against all costs incurred and to be incurred, with reference to the subject matter assigned, but also against all costs to be incurred in that suit for collateral objects and claims, totally distinct from the subject matter assigned, it will be held void for maintenance." And see *Harrington v. Long*, 2 My. & K. 590.

On the whole, I am of opinion that our judgment should be for the defendants on demurrer.

WILSON, J.—The paper book shews an agreement between the plaintiffs and defendants, that may perhaps have been void for champerty and maintenance in the first instance. The paper book further shews, that afterwards, by reason of it, the now defendants and the said shareholders and stockholders were made parties as co-plaintiffs in the Chancery suit with the present plaintiffs, who were the original plaintiffs in that suit, against Richardson and others: that the defendants in the Chancery suit then set up against the persons who were so added as co-plaintiffs that they had acquired an interest in that suit by means of the agreement declared on, which was void for champerty: that the now defendants denied the fact and charge: that the cause was compromised between the parties to it, and a decree was thereupon made, by which the now defendants were, with the said subscribers and stockholders, allotted certain portions of the land mentioned in the agreement; and by virtue thereof, and certain other benefits thereunder, and certain conveyances which were executed under the decree, which they accepted, the agreement was treated and acted upon by all the parties thereto as a good and valid agreement in law, and was so recognized by the Court of Chancery by the said decree; and that the lands which the said defendants so became entitled to were the same lands which Elmer and Gray procured a bond therefor to the plaintiffs, as stated in the declaration.

And the question is, whether the equitable replication setting up these facts is a good answer to the plea of champerty.

Would the Court of Equity grant a perpetual injunction against the defendants from setting up the defence, or would the Court of Equity permit the defendants, after the compromise and decree made in pursuance of it, to contest the validity of the agreement and the efficacy and force of the decree of the Court?

It appears to me it would not, where no fraud or concealment, or undue practice of any kind can be charged against the plaintiffs.

A person who may have a defence on the ground of champerty is not compelled to set it up. If instead of doing so he assents to the transaction, and deals with the party or parties who were concerned in it, by compromise or otherwise, in or out of Court, and acquires or grants rights in pursuance of the new and voluntary arrangement, or agrees to acquire or grant them, he cannot in my opinion afterwards set up the original ground of defence.

Suppose a bond, with a condition for payment of several instalments of money at different days, had been given when usury would have avoided it, and a judgment had been recovered on it for default in payment of one of the instalments, no defence having been made to it, could the defendant, when a second suit was brought suggesting a further breach, plead usury to the suggestion? I think not. He would be concluded by the former recovery from setting up any defence which he could have set up in the former action: 1 *Chy. on Plg.*, 7th ed., 512; *Henderson v. Henderson*, 6 Q. B. 288; *Bank of Australasia v. Nias*, 16 Q. B. 717; *Castrique v. Imrie*, 8 C. B. N. S. 405; *De Cosse Brissac v. Rathbone*, 30 L. J. Ex. 238.

So if an action were brought on a contract invalid because not in writing, could the defendant, if he had been sued before on it at law, and had admitted or had not denied it to have been a binding contract, or if proceedings had been taken on it in equity, and the defendant had not set it up, or had not denied it to have been an agreement enforceable against him, be afterwards heard to say there was no agreement because it was not in writing? I think he could not. He would be estopped by the previous admissions or *quasi* admissions he had made.

It is clear that to a *sci. fa.* on a judgment the defendant can never plead a defence which he might have set up to the original action: 2 *Saund.* 72 *aa*, notes, 72 *bb*; *Bradley v. Urquhart*, 11 M. & W. 456.

In *Jenkins v. Robertson*, L. R. 1 H. L. Sc. App. 117, a decree obtained by arrangement between contending parties, the Court bestowing no judicial examination on the

merits, was held not to be *res judicata*. But that was in an action of declarator to establish a right of way which would have been binding on the public.

As to the effect of the decree in equity, see 1 *Spence's* Eq. Jur. 529 to 532 ; *Hunter's* Suit in Equity 88, 89.

Suppose, after the making of the agreement between plaintiffs and defendants, the plaintiffs had engaged to pay a particular sum of money to defendants in consideration of their giving up all their interest in the original agreement, could the second agreement have been enforced by defendants against the plaintiffs ? If not, would it make any difference that the persons who could impeach the original contract, the Chancery defendants, became parties to the new agreement with the plaintiffs and defendants ?

The case of *Powell v. Knowler*, 2 Atk. 224, is very applicable to such an arrangement, and effect was given to it there.

If the Court of Chancery will, by injunction or otherwise enforce the decree, the defendants must be estopped by the replication from impeaching the deed by plea.

I feel very strongly that this must be so when the instrument does not on its face disclose the illegality relied on. But when it does I think there is a difficulty in using an instrument as the basis of an action which the Court must see is illegal and void, although it is not pleaded or excepted to.

Probably the action might be maintained setting out the agreement just as it was made in fact, and the Chancery proceedings and decree had and made on it, and then alleging a promise to be implied by law, arising on the subsequent transactions, to carry out the terms of the original agreement.

If a deed or agreement in fact had been made to that effect, I feel very confident an action could have been maintained on it: *Powell v. Knowler*, 2 Atk. 224.

In such a case it " would not be the illegal contract that was given effect to, but the subsequent legal contract founded on a new and sufficient consideration. \* \* For although

the original contract of sale should be deemed to be illegal on the part of the seller, yet the transfer is a legal act, and for a legal purpose. There is here therefore a dividing point. The transaction, if illegal in its inception, had ceased to be so. \* \* \* At the time when the consideration arose on which the promise rests, the act out of which it arose was legal, and the parties were engaged in carrying into effect a lawful agreement." Per Lord Denman, C.J., in giving the judgment of the Exchequer Chamber in *McCallan v. Mortimer*, 9 M. & W. 636.

As the record now stands I think there must be judgment against the plaintiffs. I do not wish to express such an opinion as will conclude me from expressing a different opinion if the case should be brought up on amendment again for discussion, for I have not examined the matter sufficiently, as it is not necessary I should do, but have rather suggested matters which have presented themselves to my own mind for the consideration of the parties.

At present I concur in the conclusion arrived at by my brother Morrison.

I have taken no notice of the fact, as it was not argued, that Tannahill is the only defendant who apparently signed and sealed the agreement.

RICHARDS, C.J., having been absent during the argument, gave no judgment.

*Judgment for defendants.*

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## JOHNSTON V. HASTIE.

*Fire—Injury caused by—Liability of defendant.*

One M. agreed to burn and clear off the timber on defendant's fallow at a certain price per acre. While the work was in progress the defendant, who lived on the place, came occasionally to see how it was getting on, and advised him to set fire to the log heaps. M. told defendant that a brush fence, which extended to the corner of plaintiff's land, might take fire, but defendant said it would make no difference. M. then fired the heaps, and went home, two or three miles off, intending to return in a few days, when the heaps should be ready for branding. During his absence the fire spread to the plaintiff's land, and burned his fences, &c. The jury having found for the plaintiff on the charge of negligence:

*Held*, that M. upon the evidence was not an independent contractor, over whom defendant had no control, but rather a workman in his employment and subject to his directions; and that defendant was responsible.

*Quære* per Wilson, J., whether if M. had been such contractor the defendant would have been liable.

APPEAL from the County Court of the County of Huron.

The action was brought by the plaintiff against the defendant to recover damages for injuries sustained by the plaintiff through the burning of hay and grass on his premises, as well as the fences, by the negligence of the defendant and his servants in setting fire to some log heaps on the defendant's land, which extended to the adjoining farm of the plaintiff.

The declaration contained two counts, and the defendant pleaded not guilty.

The cause came on for trial by a jury, and a good deal of evidence having been produced on both sides, the jury found in favour of the plaintiff, and \$70 damages.

At the close of the plaintiff's case it was objected by the defendant's counsel that one McConnell, who did the work for the defendant, and not the defendant, was liable for the injury complained of. The learned Judge overruled the objection, reserving leave to the defendant to move to enter a non-suit. In his charge to the jury he told them, that if they were of opinion that the fire spread from the defendant's land to the plaintiff's in consequence of the negligent manner in which the burning on the defendant's land was

conducted and managed, they should find for the plaintiff, as McConnell, whom the defendant employed to do the logging and burning, was to be considered the agent and servant of the defendant.

In the following term the defendant's counsel obtained a rule *nisi* to enter a nonsuit on the leave reserved, on the ground that McConnell was at the time of the clearing and burning in the pleadings mentioned a contractor acting independently of the defendant, and was not the servant of the defendant or under his control, and that being such contractor McConnell cleared and burnt the land, and was liable to the plaintiff, and that the defendant was in no wise liable for the consequences of McConnell's negligence in performing his contract.

After argument, the learned Judge discharged the rule, being of opinion that McConnell was the workman and servant of the defendant in the work in which he was employed. From that judgment the defendant appealed, upon the ground that it was contrary to law and evidence, in deciding that McConnell was not a contractor acting independently of the defendant, but was the servant of the defendant under his control, and that the defendant was liable for the negligence of McConnell.

On the trial before the learned County Court Judge, it appeared that the defendant owned, lived upon, and cultivated the farm adjoining the plaintiff's, separated by a division fence, and that the defendant employed McConnell to burn and clear off timber on his lot, taking from him the following document :

"27th April, 1868.—I, the undersigned, George McConnell, promise to burn and clear off all the timber on the dry land in William Hastie's fallow on or before the first of August next, at \$8 per acre.

(Signed) GEORGE MCCONNELL :"

That McConnell proceeded with the work : that while it was in progress the defendant visited it occasionally to see how it was getting on : that when the greater part of

the logging was done defendant advised McConnell to set fire to what had then been logged: that in June, the logs being then in heaps for burning, some of which heaps were close to the plaintiff's fence and to a brush fence which extended to the northern corner of the plaintiff's meadow. McConnell set fire to the heaps, and went home, some two or three miles distant, intending to return in two or three days, in which time he thought the heaps would be ready for branding. Before leaving he told the defendant that the brush fence might take fire, to which the defendant replied it would make no difference.

It appeared also that defendant was fully aware of the fire being set to the heaps, some of which according to the testimony were so close to the division fence that it was impossible to burn them without setting fire to the fence. Two or three days after McConnell left the defendant went to McConnell, and told him that the fire was spreading and to come and attend to it, saying that he, McConnell, would be responsible. McConnell, on the other hand, asserted that it was the defendant's business. That evening McConnell went to the place, and found that the fire had spread into the plaintiff's meadow. Nothing was done to check the fire until next morning, when an attempt was made to do so.

Evidence was also given respecting the negligence and the amount of damage, which is not necessary to be considered.

During Hilary Term, 1869, the appeal was argued.

*McKenzie*, Q. C., for the appellant, cited *Serándat v. Saïsse*, L. R., 1 P. C. 152; *Milligan v. Wedge*, 12 A. & E. 737; *Sadler v. Henlock*, 4 E. & B. 570; *Peachey v. Rowland*, 13 C. B. 182; *Mitchell v. Crassweller*, *Ib.* 245; *Butler v. Hunter*, 7 H. & N. 826; *Steel v. South Eastern R. W. Co.*, 16 C. B. 550; *Knight v. Fox*, 5 Ex. 721; *Reedie v. London and North Western R. W. Co.*, 4 Ex. 244; *Allen v. Hayward*, 7 Q. B. 960; *Overton v. Freeman*, 11 C. B. 867.

*S. Richards*, Q. C., contra, cited *Ellis v. Sheffield Gas Consumers Co.*, 2 E. & B. 767; *Pickard v. Smith*, 10 C. B. N. S. 470; *Hole v. Sittingbourne and Sheerness R. W. Co.*, 6 H. & N. 488; *Rapson v. Cubitt*, 9 M. & W. 741.

MORBISON, J.—I am of opinion that the appeal should be dismissed.

I confess that I had very considerable doubts during the argument, but after examining the various authorities, and the principle upon which they have proceeded, I have arrived at the conclusion that the defendant is responsible.

The question in this case (as in nearly all the cases cited) turns upon the relation subsisting between McConnell and the defendant. It was contended on the part of the appellant that the defendant severed himself from the work to be done by McConnell, and that he had in relation to it no control over him whatever. I think the evidence goes to shew that the position of McConnell was not that of an independent contractor, because he engaged to burn and clear off the timber within a particular time and at the rate of so much per acre for the job. We have to consider the kind of work to be done, the place where it was to be done, and all the surrounding circumstances. One can hardly suppose that the defendant relinquished all power and authority over the work or the mode of doing it, particularly as to the time of setting fire to the log heaps.

It appears to me that McConnell was, in the ordinary position of a workman employed to do this work on the defendant's place, to be paid so much for the job, and that the engagement entered into by McConnell by the memorandum put in at the trial did not, as contended by Mr. McKenzie, deprive the defendant of the supervision and control of the work. It is in evidence that the defendant watched the work progressing: that he advised as to setting fire that he was aware while the heaps were burning McConnell would be absent, and when told by McConnell that a brush fence which extended to the plaintiff's meadow might take

fire, he replied it made no difference. All this goes to shew that McConnell was as a workman in the employment of the defendant, subject to his directions and ordinary supervision. He could have stopped him at any time from proceeding with the work.

In the case of *Sadler v. Henlock*, 4 E. & B. 570, the defendant directed one Pearson to cleanse out a drain. The defendant paid him 5s. for the job. Pearson was not otherwise in the employment of the defendant. The defendant was not shewn to have interfered with the work, or to have seen the way in which it was executed, or to have given any specific directions. Pearson so imperfectly replaced the soil of the highway that the plaintiff's horse in passing over it was injured. It was contended that the defendant was not liable, but the Court held otherwise. The question there was, whether Pearson was to be considered the defendant's servant or an independent contractor. Crompton, J., said: "No distinction can be drawn from the circumstances of the man being employed at so much a day or by the job." And applying to this case what Lord Campbell said: Had McConnell been the domestic servant of the defendant, and the defendant had said to him, "Go and set fire to the log heaps," no doubt McConnell doing the work negligently would have made the defendant liable. Then what difference can it make that McConnell was an independent laborer, to be paid by the job? And Wightman, J., said: "Pearson was not a person exercising an independent business; but an ordinary laborer, chosen by the defendant in preference to any other, but not exercising an independent employment." So in this case McConnell was not exercising an independent business or employment; he was working on the premises of the defendant, and had no independent control over the place or the work he was doing.

And in *Ellis v. The Sheffield Gas Consumers Co.*, 2 E. & B. 767, Lord Campbell, in giving judgment, says: "Mr. Jones argues for a proposition absolutely untenable, namely, that in no case can a man be responsible for the

act of a person with whom he has made a contract. I am clearly of opinion that, if the contractor does the thing which he is employed to do, the employer is responsible for that thing as if he did it himself. \* \* It would be monstrous if the party causing another to do a thing were exempted from liability for that act, merely because there was a contract between him and the person immediately causing the act to be done."

A very late case, *Serándat v. Saïsse*, L. R. 1 P. C. App. 152, in which all the cases are referred to, was relied on on the argument. That case is, I think, an authority in favor of the respondent. There, as here, it was contended that the appellant had severed himself from the execution of the work, which was similar to that engaged to be done in the case before us, clearing land at a certain price for the job, and the injury there arose from the setting fire to a heap of rubbish. But the Court there was of opinion that the evidence shewed that in point of fact the defendant did interfere and control the men in the course of the work, and that it did not appear the general surveillance of the work was relinquished by the defendant. And it seems to me that the evidence of control and interference in that case is not stronger than what appears in the one before us.

On the whole I think the appeal should be dismissed with costs.

WILSON, J.—The first question is, whether the defendant himself so far personally interfered with the work done by McConnell, the person he had hired by the job to do the work, as to make himself personally liable.

The second question is, whether, if there was no such personal interference, the defendant is in point of law responsible for his workman's conduct.

The facts are, the plaintiff lives on the east half, and the defendant on the west half of the same lot. The following agreement in writing was made between the defendant and McConnell: "I the undersigned, George McConnell, promise

to burn and clear off all the timber on the dry land in William Hastie's fallows on or before the first of August next, at eight dollars per acre."

McConnell said: "Defendant came occasionally to see how the work was getting on. Towards the end of June I set fire to the heaps, and then I went away for a couple of days until the heaps should be fit for branding. Defendant I think knew I was going away, but I am not certain. I was away two or three days, when defendant sent for me. I mentioned to defendant before I left that the brush fence might take fire, and he said it made no difference. Hastie himself came for me. He said the fire had spread out, and that I should come and attend to it; and he said that he had nothing to do with the fire, and that I should be responsible for it. I said I thought it was his business, but he said he had nothing to do with it, and that the fire might go where it liked, and he would not put a hand to it. \* \* \* I don't remember whether defendant came down to the spot after I had fired the heaps, but he could have seen the fire from the field he was working in. \* \* Defendant did not at all interfere with me in the manner of doing my work in clearing up. He advised me to fire the heaps, but did not order me."

A good deal of other evidence was given, but not to contradict the above statement of McConnell.

The fire, from this evidence, was made on defendant's farm by a person having the job to clear and burn. Defendant saw the work going on, knew of the fire being set, advised it to be done, said it made no difference if the brush fence (his own fence, as I understand) took fire, knew McConnell went away for two or three days while the burning was going on, leaving it wholly unattended to, the defendant all the while living on the farm where the fire was raging, at an exceedingly dry season.

From all this evidence I think there is sufficient to fix the owner and the occupant with the responsibility for the conduct and management of the fire set upon his own place, and by his own advice, and afterwards to his knowledge

left unattended to for some days by his own employee, and which ultimately spread and did a good deal of damage.

I do not feel obliged to consider the other question—whether, if McConnell were what is called an independent workman or contractor, and not an ordinary hired servant, the defendant could or could not be held responsible for his acts and negligence.

It is one which appears to me to be at present in great doubt, and respecting which the decisions are in much confusion, and very contradictory. I am glad I have not to form an opinion on such a subject.

I agree therefore in the result arrived at.

RICHARDS, C.J., concurred.

*Appeal dismissed.*

# THE TRUST AND LOAN COMPANY OF UPPER CANADA V. COVERT AND RUTTAN.

*Covenant for quiet enjoyment—Breach—Proceedings in Chancery.*

Declaration, that defendant by deed conveyed land to one T. in fee, covenanting that he should peaceably and quietly enjoy, without the let, suit, &c., of defendants or any person: that T. conveyed to the plaintiffs, who entered into possession; and afterwards a bill in Chancery was filed against plaintiffs and defendants, and it was decreed in the suit that defendants had no right to convey, being trustees only; and the plaintiffs were ordered to convey the land and give up possession thereof, and of their deeds, to two trustees named, whereby the plaintiffs had lost the land, and been compelled to pay costs of the suit, &c.

*Held*, that a good cause of action was shewn: that it was unnecessary to allege an eviction; and that the proceedings in Chancery constituted a breach of the covenant.

One defendant pleaded that since action the plaintiffs had conveyed the land to C. and M.; and the other, that the plaintiffs had so conveyed in pursuance of the decree, C. and M. being the trustees appointed thereby. *Held*, clearly no defence.

THE declaration alleged that the defendants by deed conveyed certain lands to one Thompson, and covenanted with the said Thompson, his heirs and assigns, that it should and might be lawful for him, his heirs and assigns, peaceably and quietly to enter into, have, hold, use, possess,

occupy, and enjoy the aforesaid lands, tenements, hereditaments, and premises thereby conveyed, with the appurtenances thereof, without the let, suit, hinderance, interruption, or denial of the defendants, their heirs or assigns, or any other person or persons whomsoever, and that free and clear, &c.: that the said Thompson afterwards conveyed the said lands and the estate of the said Thompson therein to the plaintiffs, and the plaintiffs entered into possession thereof; yet the plaintiffs say, that after the execution and delivery of the said deed to the said Thompson, and after the conveyance to the plaintiffs, certain persons (naming them,) to whom a good title to the premises as against the plaintiffs and the defendants, and not derived from either of them, had accrued in manner hereinafter mentioned, filed their bill in the Court of Chancery for Upper Canada against the said plaintiffs and the defendants and others (naming them,) whereby, after alleging, as the fact was, that the said defendants hereto, before and at the time of the date of the said conveyance to the said Thompson, were seized of the said premises only upon trust for the wife of the said Thompson during her life, and after her decease for their children, and in default of such issue for the heirs of one W. H. T., and that the said defendants hereto had no beneficial interest in or title to the said premises, although no declaration of the said trusts appeared on the face of the conveyance under which the said defendants hereto were at law seized of the said premises, and that the said plaintiffs in the said suit in Chancery were the children of the said Thompson and his said wife, it was prayed, amongst other things, that the said deeds from the defendants to the said Thompson, and from the said Thompson to the plaintiffs, should be delivered up to be cancelled, and the said plaintiffs herein ordered to convey the premises to the plaintiffs named in the said bill; and such proceedings were thereupon had and taken in such suit that on, &c., a decree was duly made and pronounced by the said Court declaring that the said wife and the plaintiffs in the said suit in Chancery,

namely, &c., were and are beneficially entitled to the said lands, and ordering and decreeing, amongst other things, that two proper persons should be appointed trustees to hold the said lands and premises in trust for the said wife for life, and for the said plaintiffs in the said suit in the said Court of Chancery, as her lawful issue by the said Thompson, as tenants in common in fee, and that the plaintiffs should execute to such trustees a conveyance of the said lands, to hold for the said wife and children upon the said trusts thereby declared, and that the plaintiffs should deliver up all deeds in their custody, including the said deeds from the defendants to the said Thompson, and from the said Thompson to the plaintiffs, to the said trustees, and should deliver up possession of the said premises to the said trustees. By reason of which the plaintiffs have not only lost the said lands, but have been obliged to pay the costs of the said plaintiffs in the said suit in Chancery, &c.

The defendant Ruttan pleaded, that since action the plaintiffs by deed conveyed the said lands to C. and M., their heirs and assigns, and that the said C. and M. are seized of the said lands in their demesne as of fee.

The defendant Covert pleaded that the plaintiffs did, in pursuance of the said decree in the said Court of Chancery in the declaration mentioned, convey the said lands in the declaration mentioned to C. and M., trustees duly appointed in pursuance of the said decree.

The plaintiff demurred to the plea of defendant Covert; and replied to the plea of defendant Ruttan, that said C. and M. were and are the two trustees duly appointed under and by virtue of the said decree, and the said deed was thereupon, in obedience to the said decree, made by the plaintiffs to them, their heirs and assigns, upon the trusts by the said decree declared, and said C. and M. are now seized of the said lands as such trustees.

The defendants joined in demurrer to the plea, demurred to the replication, and gave notice of the following exceptions to the declaration:—that the facts alleged constitute no

breach of the alleged covenant: that for all that appears the plaintiffs took the conveyance of the land upon the same trusts upon which the defendants held the same, and with full notice thereof: that for all that appears the defendants conveyed the said land to the said Thompson upon the same trusts upon which they held the same, and with full notice thereof: that the alleged defects of title are only defects in equity, and not in law, and only become a breach of any of the alleged covenants through and by virtue of the decree in the declaration mentioned: that no eviction or disturbance of the plaintiffs is alleged except that caused by the said decree, and by the same decree, as appears by the declaration, the plaintiffs were ordered at the same time to deliver up possession of the said lands, and to convey the same to the trustees, and to deliver to them the deeds in the declaration mentioned; and so the plaintiffs by their own shewing have lost and been deprived of their right of action, if any, against the defendants, and the benefit of the said alleged covenant, if any, has passed to the said trustees.

The case was argued during last Michaelmas Term.

*Moss*, for the demurrer, cited *Rawle* on Covenants for Title, 3rd Ed., 171; *Hunt v. Danvers*, Sir T. Raym. 370; *Brunskill v. Wilson*, 25 U. C. R. 248; *Carpenter v. Parker*, 3 C. B. N. S. 206; *Lucy v. Levington*, 2 Lev. 26.

*Armour*, Q. C., and *C. S. Patterson*, contra, cited *Hunt v. White*, 37 L. J. Chy. 326; *Kingdon v. Nottle*, 4 M. & S. 53; *Jones v. King*, *Ib.* 188; *Cuthbert v. Street*, 9 C. P. 386; *Meredith v. McCutcheon*, 13 C. P. 209; *Lewin* on Trusts 557, citing *Burgess v. Wheate*, 1 Eden 195; Sug. V. & P., 13th Ed., 620, citing *Harrison v. Forth*, 1 Eq. Cas. Ab. 331; *Thackeray v. Wood*, 5 B. & S. 325; *Snarr v. Baldwin*, 11 C. P. 353.

MORRISON, J.—I am of opinion that the plaintiffs are entitled to judgment.

The facts as they are spread out in the declaration are simple:—that defendant by deed conveyed certain lands in

fee to one Thompson, &c., and covenated with T., his heirs and assigns, that it should and might be lawful for T. and his heirs, &c., peaceably and quietly to enter into and have, hold, use, possess, occupy, and enjoy the lands, &c., without the let, suit, hinderance, interruption, or denial of the defendants, &c., or any other person or persons whomsoever, and that freely and clearly acquitted, &c.: that T. afterwards, for valuable consideration, by deed conveyed the premises to the plaintiffs: that the plaintiffs entered into possession of the premises: that afterwards certain persons (naming them), children of T., filed a bill in Chancery against the plaintiffs, and T. and his wife, &c., and the defendants, alleging, as the fact was, that the defendants at the time of the deed to T. were seized of the premises upon trust for the wife of T. during her life, and after her decease for the children of T., and that the defendants had no beneficial interest in the title to the premises, although no declaration of such trusts appeared on the face of the conveyance under which the defendants at law were seized of the premises; and the bill prayed that the deed from the defendants to T., and from T. to the plaintiffs, should be delivered up to be cancelled, and the plaintiff ordered to convey the premises to the plaintiff named in the bill: that afterwards a decree was pronounced in favor of the plaintiffs in Chancery, and that the lands in question should be conveyed to two trustees upon the trusts mentioned in the bill, and that the plaintiffs should convey the lands to such trustees and deliver up the deeds in their custody, and the possession of the premises, to such trustees. The declaration then alleges that by reason thereof the plaintiffs have not only lost and been deprived of the lands, but were obliged to pay the costs of the plaintiffs in the Chancery suit, amounting, &c.

It was contended very strongly in the argument that the facts appearing on the face of the declaration constituted no breach of the covenant, and many alleged defects were with much ingenuity pointed out. I then entertained some doubts whether the declaration could be sustained,

but upon further consideration I have no doubt that the plaintiffs are entitled to succeed.

It was pressed that no actual eviction was shewn. A number of cases were cited, but no authority bearing directly upon the question.

Mr. Rawle, in his excellent Treatise on Covenants, at page 198, 2nd Ed., in speaking of the covenant for quiet enjoyment, says: "As it thus sufficiently appears that the scope of this covenant depends, in so many cases, upon the particular words employed in its expression, it will be readily seen that it is impracticable to lay down a universal rule as to what will cause its breach. It has been constantly confounded with the covenant of warranty; so much so that in some cases the covenant has been spoken of as a covenant for quiet enjoyment, while in fact it was a covenant to warrant and defend. It is somewhat generally said in the United States that 'the covenants for quiet enjoyment and of warranty are broken only by an eviction,' but in order to shew this not to be universally true of the former, it is only necessary to refer to its form, as constantly used, stipulating against 'any let, suit, interruption,' &c.," (as in the covenant we are now considering). "Such a distinction was noticed by that accomplished jurist, the late Mr. Chief Justice Gibson, in a very recent case. 'A covenant for quiet enjoyment,' said he 'which resembles the modern covenant of warranty, differs from it in this, that the former is broken by the very commencement of an action on the better title.'"

And at page 237, Mr. Rawle says, in referring to the covenant of warranty: "'It differs from it in this,' said Gibson, C. J., in a recent case, 'that the latter is broken by the very commencement of an action on the better title.' This remark must be applied to the covenant for quiet enjoyment as usually expressed at length in English conveyances, in which 'any let, suit, interruption, disturbance,' &c., are expressly covenanted against. But where, as is often the case in this country (U. S.) the latter covenant is briefly expressed by the words 'that the said (grantee) and

his heirs and assigns shall quietly enjoy the premises,' &c., the remark of the Chief Justice would lose its application, as the weight of American authority is decisive that to cause a breach of a covenant thus expressed an eviction or something equivalent to it is indispensable."

And in Mr. Platt's work on Covenants, at page 322, he writes, "Formerly it was supposed that a court of common law could not recognize proceedings in equity, and on this ground it was resolved that a suit in Chancery was not a breach of a general covenant for quiet enjoyment; but this decision has been denied, and the contrary is settled. All question on the point is now avoided, by introducing into the covenant for quiet enjoyment a few words extending to suits in equity; thus: 'that the purchaser shall enjoy without any let, suit, &c., by the vendor or his heirs,' &c." And at page 327: "It is not to be understood that an ouster or expulsion must take place in order to found a suit; it is enough that the quiet enjoyment of the covenantee be invaded or prevented."

I also refer to the case of *Carpenter v. Parker*, 3 C. B. N. S. 206, and to *Rolph v. Crouch*, L. R. 3 Ex. 44.

It seems to me, from an examination of these authorities, that in order to constitute a breach of a covenant for quiet enjoyment, in the terms used in this covenant, it is not necessary that there should be an actual eviction. I cannot see why, when it is discovered that a paramount title existed before and at the time of the conveyance to the covenantee, and a suit is commenced to obtain possession of the property, and, as in this case, a competent court has decided that the covenantee must give up possession, and he is put to costs in the defence of that possession, the covenantee may not at once take advantage of the covenant, and not wait until he is put to more costs by being ejected. He certainly does not under such circumstances peaceably possess and occupy the premises, without any let, suit, interruption, &c.

I therefore think that the objections to the declaration are not sustainable.

Then as to the demurrer to the pleas. I cannot see that the plea of the defendant Ruttan is any answer to the cause of action, viz., that the plaintiffs since this action conveyed the lands to the parties named in the plea. It seems to me that the case of *Cuthbert v. Street*, 9 C. P. 386, is a direct authority against the defendant. There it was held that a conveyance in fee by way of mortgage, made subsequently to a breach of covenant for quiet enjoyment, and to the bringing of an action to recover substantial damages arising from that breach, does not estop the mortgagor from maintaining an action against the vendor of the party from whom he purchased on the covenant contained in the vendor's title to that party.

The same principle applies with regard to the plea of the defendant Covert, with this difference, that that defendant sets up as a defence what is really the cause of action of the plaintiffs, the carrying out the decree of the Court of Chancery.

I am therefore of opinion that the declaration is good, and that the defendants' pleas shew no defence, and that our judgment should be for the plaintiffs on the demurrer.

WILSON, J., concurred.

RICHARDS, C.J., not having heard the argument, took no part in the judgment.

*Judgment for plaintiffs.*

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## THE QUEEN V. CAISTER.

*Conviction for not paying tolls—C. S. U. C. ch. 49.*

A conviction under Consol. Stat. U. C. ch. 49, sec. 95, stating that defendant wilfully passed a gate without paying and refusing to pay toll: *Held*, good. *Quere*, whether it would be sufficient to allege only that he wilfully passed without paying, without in any way shewing a demand.

*Held*, also, that the non-exemption of defendant, if essential to be alleged, was sufficiently stated in the conviction.

*Held*, also, the general form prescribed by Con. Stat. C. ch. 103, sec. 50, Sched. I. (1), being used, that it was clearly not requisite to shew that defendant was summoned or heard, or any evidence given.

*Held*, also, unnecessary to name any time for payment of the fine, as it would then be payable forthwith.

It was objected also; 1. That M., the keeper and lessee of the gate, had no authority to exact toll; 2. That the corporation had been dissolved; 3. That no board of directors had been appointed since 1866; 4. That if legally appointed they could not lease the gate; 5. That the lease to M. had expired; 6. That he could not take advantage of the penal clauses in the Act; 7. That it was not shewn that any tolls had been fixed: but *Held*, that these objections could not be taken, for where, assuming the facts to be true, the magistrate has jurisdiction, the conviction only can be looked at.

*Held*, also, as to objections 1, 4, and 6, that they were otherwise untenable; and as to Nos. 2, 3, and 5, that the existence of the corporation could not be enquired into on this application to quash the conviction.

On the 4th of August, 1869, James Caister was convicted before William Wilson, J.P., for that he did, on the 27th July, 1869, at &c., “with a certain vehicle drawn by two horses, which the said James Caister was then and there driving, wilfully pass and drive through the toll-gate known as toll-gate number one on, and drive upon, over, and along, the Woodstock and Huron Plank and Gravel Road, the same being a toll-gate and road lawfully established by the Woodstock and Huron Plank and Gravel Road Company, a duly incorporated Joint Stock Company according to law, without paying, and then and there refusing to pay, to Hector Murray the renter and keeper of the said toll-gate, at such gate the sum of ten cents, the legal toll chargeable, fixed, and payable by persons passing such toll-gate with vehicles drawn by two horses (he, the said James Caister, not being exempt by law from paying toll on the said road) contrary to the statute in such case made and provided.” And he was adjudged to pay \$1, to be paid and applied according to law, and \$7 80c. to the complainant for his costs. “And if the

said sums be not paid, I order that the same be levied of the goods and chattels of the said James Caister."

In Michaelmas Term last, *Harrison*, Q. C., obtained a rule calling on Hector Murray, the informant, and W. Wilson, the convicting justice, to shew cause why the conviction should not be quashed, with costs to be paid by Hector Murray, on the following grounds :

1. That the conviction does not shew that toll was demanded of Caister.

2. That it does not with sufficient particularity negative the fact that Caister was one of a class exempt under the Consol. Stat. U. C. ch. 49, sec. 91.

3. That it does not shew that Caister was summoned or heard ; and is bad, in not stating that any complaint was made or evidence given by any one in support of the charge.

4. That no time is fixed for payment of the fine and costs.

5. That Hector Murray was not lawfully entitled to demand or receive toll from Caister.

6. That for non-payment of toll by Caister to Murray there was no power to commit Caister.

7. That the Woodstock and Huron Plank and Gravel Road Co. as a corporation has been dissolved.

8. That there has been no legally authorized board of directors of the corporation since 1866 appointed as the statute directs.

9. That although Murray took possession of the gate under a lease made while there was a legally authorized board, the board and lease had expired long before the alleged offence of Caister.

10. That even if there was a legally authorized board, nothing contained in the statute allows such boards to farm or rent toll-gates.

11. That Murray took no lease of said gate at the time of the alleged offence.

12. That a lessee of tolls has no power to avail of the penal clauses of the statute for the collection of tolls or punishment for non-payment of tolls.

13. That there was nothing to shew that the president and directors of the said Company had fixed or regulated tolls to be received at said gate.

In Hilary Term last, *Crombie* shewed cause. The original cause of complaint arises under Consol. Stat. U. C. ch. 49, sec. 95. The form of conviction is under Consol. Stat. C. ch. 103, sec. 50. Taking the objections in order :

1. Sec. 95 says nothing of demanding toll. The offence under it is complete when any person, not exempted by law from paying toll, wilfully passes any toll gate lawfully established without first paying the legal toll. The party may have driven so rapidly that no demand could be made. By sec. 96 a demand must be made before distraining, and that shews it need not be made in other cases.

2. Before the late forms of conviction were authorized perhaps non-exemption must have been alleged, but that would depend upon whether the exemption was in the enacting part or in a proviso. Consol. Stat. C. ch. 103, sec. 44, shews that the party must set up and prove his exemption : *Paley on Convictions*, Ed. 1866, p. 239. The exemption however is negatived; the complaint is that it has not been sufficiently negatived, which is unfounded. *Cook v. Swift*, 14 M. & W. 238; *Regina v. Dawes*, 22 U. C. R. 333; *Stamp v. Sweetland*, 8 Q. B. 13; *Regina v. Shaw*, 23 U. C. R. 616; *Re Allison*, 10 Ex. 561, all shew the statutable form of conviction must be sufficient.

3. As to the alleged want of a summons and hearing, the form cures the necessity of stating these facts : *Moore v. Jarron*, 9 U. C. R. 233.

4. The statute prescribes the payment of fine and costs to be forthwith or at such time as the justice shall fix ; and that being so, and no time named, the payment must be forthwith. The conviction is like a civil judgment in that respect. The precise form given by the act is not necessary to be followed.

5. The Court cannot, against the conviction, hold that Hector Murray had not power to demand toll. That fact

might be enquirable into on affidavits : *Ex parte Vaughan*, L. R. 2 Q. B. 114 ; *Re Pater*, 10 Jur. N. S. 976.

And the remaining objections are all answered in the same manner as this. It cannot be alleged in this proceeding the corporation was dissolved : *Angell and Ames on Corporations* 799-819 ; *Brockville, &c., Road Co. v. Crozier*, 14 U. C. R. 31. The Road Company may lease : Consol. Stat. U. C. ch. 49, sec. 89. The evidence upon which the conviction was made has been sent up, but the Court cannot look at it. From it, however, it appears that Murray was lessee of the tolls.

*Harrison*, Q. C., supported the rule.

1. A demand of tolls must be made : *The School Trustees of Caledon v. The Corporation of Caledon*, 12 C. P. 301.

2. It is not clearly alleged that the defendant was not exempt, and the use of the general statutory form does not cure this defect : Consol. Stat. U. C. ch. 49, secs. 91 to 95 ; *Oke's Magisterial Synopsis*, 10th Ed., 118 ; *Paley on Convictions*, 173, 202 ; *The Queen v. Johnston*, 8 Q. B. 102.

3. The cases of *Moore v. Jarron*, 9 U. C. R. 233, and *The Queen v. Haystead*, 7 U. C. R. 9, support this objection.

4. The statutory form must be used fully if the party resort to it. No time is fixed for payment.

5. The evidence shews that the board of directors has not been appointed for three years, and Murray, who was lessee at one time, was not a proper lessee to take tolls from Caister : Consol. Stat. U. C. ch. 49, secs. 73, 75, 78, 80, 87.

6. If Murray were lessee, it is only the Company that could claim the summary benefit of the statute.

7 to 13. It may be shewn that the corporation was dissolved : *Grant on Corporations*, 303 ; Consol. Stat. U. C. ch. 49, secs. 15, 37, 38, 40, 44, 89, bear upon these objections.

13. There is no evidence at all that tolls had been fixed at any time ; and this is essential : Consol. Stat. U. C. ch. 49, secs. 73, 75.

WILSON, J.—The conviction is in the very form given by Consol. Stat. C. ch. 103, Schedule I. (1), and is applicable, by section 50 of that statute, to section 95 of the Road Act, (Consol. Stat. U. C. ch. 49) excepting that it does not state that the fine and costs are to be paid “forthwith on or before the            day of            next.” And the offence is charged in the very words of the Road Act, section 95.

The first objection, that the conviction does not shew that any demand of the toll was made, is the most serious objection that has been raised. It shews that Caister wilfully passed and drove through without paying toll, but I do not feel sure that that would be sufficient. It shews, however, that he “then and there refused to pay the same,” which I think plainly establishes and gives effect to the *wilfulness* of his act, by shewing that it was more than a mere non-payment, but a persistent denial of payment altogether. I think the conviction therefore sufficient in that respect.

The second objection is negatived by the conviction. The proof, by chapter 103, section 44, rested on Caister to establish.

The third objection is not now sustainable, since the statute has supplied a form<sup>n</sup> to be used.

The fourth objection is, that while section 95 of the Road Act fixes no time for payment of the fine and costs, that the conviction must be bad because it fixes no time for payment either, merely because the general form in chapter 103 says, “forthwith, on or before            day of            next,” which seems rather inconsistent. No day being given for payment, it is payable at once.

The fifth objection, and all following it, are matters not now disputable or enquirable into if the conviction alone is to be looked to. I am of opinion it is. If the magistrate had jurisdiction, assuming the facts to be true, the conviction alone is before the Court.

The fifth objection, besides, is based on the assumption that Murray, the toll-gate keeper or lessee of the tolls, had no right to exact payment, and that consequently it was no offence of Caister not to pay him. If the toll-gate keeper

cannot complain or exact tolls, there will be little use in putting them on.

The sixth objection is of the same nature.

The 7th, 8th, and 9th objections, as to the existence of the corporation, cannot be gone into on this proceeding in testing the sufficiency of the conviction.

The tenth objection is of no effect. The Company may let if not restricted, and the 89th section applies expressly to "the renter or collector of tolls."

The 11th objection has nothing in it. His title, excepting as the servant, agent, or representative of the Company in the collection of tolls, is of no moment. It does not affect the offence of the applicant in any way.

The 12th objection has nothing in it.

The conviction shews expressly, against the 13th objection, which is fortunately the last in this long and untenable array of impediments, "that ten cents was the legal toll chargeable, fixed and payable," &c.

The rule must be discharged with costs.

MORRISON, J., concurred.

RICHARDS, C. J., was not present during the argument, and therefore took no part in the judgment.

*Rule discharged.*

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## WHITE V. ELLIOTT AND MOONEY.

*Insolvency—Personal Actions—Rights of assignee.*

The plaintiff, having held the defendant in the suit to bail, recovered a verdict for slander, for enticing away and detaining his wife, and for assaulting her. Before recovering judgment he made an assignment under the Insolvent Act, and he then sued the bail on their recognizance, not having yet obtained his final discharge. The defendants set up the rights of the assignee. *Held*, on demurrer, that the plaintiff was entitled to recover, for the causes of action being for purely personal wrongs did not pass to the assignee.

*Seem*, also, that the proceeds of the suit when recovered could not be claimed by the assignee, and that he therefore could not in any way interfere with the suit.

DECLARATION against special bail on their recognizance in a suit in this Court of the plaintiff against one William Young, alleging a recovery against Young, and that he had not paid the same nor rendered himself, nor had the defendants done so for him.

Plea—That the plaintiff became insolvent within the meaning of the Insolvent Acts then in force, and by his voluntary assignment, under and in the form prescribed by said acts, made on the 20th day of April, 1868, duly assigned all his estate and effects under the Insolvent Act of 1864, to John Haldan the younger, official assignee for the County of Huron, who accepted thereof under the provisions of the said act: that at the time of the entry of said judgment and the return of the execution founded on the same, the plaintiff had not, nor has he since obtained his discharge in insolvency by virtue of the said assignment, the proceedings thereunder, and the statute in that behalf; that on the entry of said judgment the said damages and costs became part of the plaintiff's personal estate, debts, assets, and effects, and that the plaintiff's rights of action, and all his other right and title thereto, and the alleged debt and cause of action in the declaration mentioned, became and were, under and by virtue of the statute in that behalf, vested in the said John Haldan the younger as such assignee as aforesaid, who alone has the right to sue for the recovery of the same.

Replication—That in and by the said action against the said William Young in the declaration in this cause mentioned, the plaintiff sued and prosecuted the said William Young upon and in respect of the following causes of action, that is to say:—for that the said William Young falsely and maliciously spoke of the plaintiff certain false and defamatory words in the first count of the declaration in said action mentioned; and also for that the said William Young wrongfully enticed and procured the wife of the plaintiff against his will to depart and remain absent from the house and society of the plaintiff, whereby the plaintiff lost her society; and also for that the plaintiff's wife unlawfully, and against the will of the plaintiff, departed from the house and society of the plaintiff, and that said William Young, well knowing the premises, wrongfully and against the will of the plaintiff, received, harboured, and detained the plaintiff's said wife, and refused to deliver her to the plaintiff, although requested by the plaintiff so to do, whereby the plaintiff lost her society; and also that for the said William Young assaulted, ill-treated, and carried away the plaintiff's wife, and kept and detained her for a certain time against the will of the plaintiff, whereby the plaintiff lost the comfort and society of his said wife during that period. And the plaintiff recovered in the said action against the said William Young the sum of 5s. assessed by the jury in the said action as his damages by him sustained on occasion of the premises and causes of action hereinbefore in this replication mentioned (a), and also the sum of £50 for his costs of suit in that behalf expended, making together the said sum of £50 5s. recovered by the plaintiff, as in the declaration in this present action mentioned; and that said judgment in the said declaration in this cause mentioned was not recovered until long after the making of the said voluntary assignment in the said plea mentioned. And the plaintiff saith that he did not recover in the said action

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(a) The verdict was recovered in March, 1868.

against said William Young upon, for, or in respect of any other cause or causes of action: than those hereinbefore especially mentioned, and that all the said causes of action were for wrongs personal to himself, the plaintiff, and were all and each and every of them such as would not pass by a voluntary assignment under the Insolvent Acts, and did not, nor did any or either of them pass to the said John Haldan the younger, under the assignment in said plea mentioned.

Rejoinder—That although the causes of action in the said replication mentioned, and for which the said action by the plaintiff against the said William Young was commenced and carried on, were the same as in the introductory part of the said replication mentioned, that after the assignment in insolvency and the acceptance thereof by the said assignee as in the said plea mentioned, and before the commencement of this suit, judgment was as aforesaid entered up in the said suit, and execution issued thereon against the said William Young: that at the time last aforesaid, and from thence until the commencement of this suit, the said plaintiff had not applied for, obtained, or effected his discharge in insolvency, whereby the causes of action on the said judgment mentioned, and the right to maintain this action, became vested in and maintainable only in the name of the said assignee.

Demurrer, on the grounds:—

1. That said rejoinder admits the facts set out in the said replication, and shews no answer in law thereto.

2. That said rejoinder admits that the causes of action in said replication would not pass to said assignee, but attempts to answer said replication, by shewing that judgment in said original action founded on said causes of action having been entered after said assignment, the same would pass to said assignee, which in law it would not do; and therefore said rejoinder does not meet said replication.

3. That said rejoinder at most only answers part of said replication, though it professes to answer the whole, inasmuch as the damages in the original action being for

personal wrongs to the insolvent, would not pass to the assignee.

4. That for contracts and causes of action arising after a voluntary assignment in insolvency the insolvent may maintain an action in his own name, unless the assignee intervenes; and the cause of action in this case having arisen after such assignment, the said plaintiff may maintain this action, because said rejoinder does not shew that said assignee has intervened or claimed the benefit of said judgment, and for all that appears by said rejoinder this action may be carried on by the plaintiff for the benefit of said estate, and by the concurrence and consent of the said assignee.

The case was argued during this term.

*S. Richards*, Q. C., for the demurrer, cited Insolvent Act of 1864, sec. 2, sub-sec. 7; Insolvent Act of 1869, sec. 10; Imperial Act, 6 Geo. IV. ch. 16, sec. 63; *Arch. Bankruptcy Law*, Vol. I. p. 302; *Deacon on Bankruptcy*, Vol. I. p. 522; *Wright v. Fairfield*, 2 B. & Ad. 727; *Benson v. Flower*, Sir W. Jones 215; *Howard v. Crowther*, 8 M. & W. 601; *Weatherell v. Julius*, 10 C. B. 267; *Rogers v. Spence*, 13 M. & W. 571; *Herbert v. Sayer*, 2 D. & L. 57, 5 Q. B. 965; *Kitchen v. Bartsch*, 7 East 53; *Clarke v. Calvert*, 3 Mod. 96.

*Osler*, contra. The assignee may, by our acts, sue in his own name for all causes of action vested in the insolvent, and he alone can sue: Insolvent Act of 1864, sec. 4, sub-sec. 9; Insolvent Act, 1869, sec. 42. He referred to *Beckham v. Drake*, 2 H. L. Cas. 622, 636, 639; *Crutwell v. Lye*, 17 Ves. 343.

WILSON, J., delivered the judgment of the Court.

The defendants became bail for Young on the 29th of November, 1867; the plaintiff made his assignment on the 20th of April, 1868, and he recovered judgment against Young after the making of the assignment.

The action for clearly personal wrongs to the plaintiff was therefore pending at the time of the assignment, but

was not reduced to a judgment till after it, and at the time of the commencement of the present action, 7th February, 1870, the plaintiff had not yet obtained his final discharge in insolvency.

The principal question is, whether the recovery by judgment of damages and costs for such personal wrongs and demands as are stated on the pleadings, remains to or passes to the official assignee, such recovery being had after the assignment and before the final discharge.

There is however the further question, whether the plaintiff may not maintain this suit, so long as it is not shewn the assignee has not intervened adversely to its prosecution.

It has been decided that unliquidated damages which accrued before bankruptcy by non-performance of a contract, passed to the assignee under the words "all the present and future personal estate": *Wright v. Fairfield*, 2 B. & Ad. 727.

Littledale, J., said in that case: "The legislature intended to give the assignees all the remedies in respect of the property which they were entitled to under the former acts, and that they should have power to sue upon contracts made with the bankrupt, and for injuries affecting his property, though not for mere personal wrongs, and such causes of action as would abate by his death." Parke, J., said: "The subject matter of this action, if not strictly a part of of the estate, is something which when recovered will be for the benefit of the estate."

In *Howard v. Crowther*, 8 M. & W. 601, Lord Abinger said: "Nothing is more clear than that a right of action for an injury to the property of the bankrupt will pass to his assignees; but it is otherwise as to an injury to his personal comfort. Assignees of a bankrupt are not to make a profit of a man's wounded feelings; causes of action, therefore, which are, as in this case, (seduction) purely personal do not pass to the assignees, but the right to sue remains with the bankrupt." And he said in the course of the argument: "Has it ever been contended that the

assignees of a bankrupt can recover for his wife's adultery, or for an assault. How can they represent his aggravated feelings?" Alderson, B., said: "Assignees can maintain no action for libel, although the injury occasioned thereby to the man's reputation may have been the sole cause of his bankruptcy."

In *Rogers v. Spence*, 13 M. & W. 571, in the Exchequer Chamber, affirmed in 12 Cl. & Fin. 700, in H. L., Lord Denman, C. J., said: "Causes of action not falling within this description (that is, relating to the property and debts of the bankrupt, and also to those rights of action which he has for unlawfully diminishing the value of his property, or for withholding or taking it from him,) but arising out of a wrong personal to the bankrupt, for which he would be entitled to remedy whether his property were diminished or impaired or not, are clearly not within the letter, and have never been held to be within the spirit of the enactment, even in cases where injuries of this kind may have been accompanied or followed by loss of property; and to this class we think the action of trespass *q. c. f.*, and that of trespass to the goods of the bankrupt, must be considered to belong."

On perusing the cases referred to, and among them the case of *Beckham v. Drake*, decided in the Exchequer, 8 M. & W. 846, reversed in 11 M. & W. 315, and the reversal affirmed in the House of Lords, 2 H. L. Cas. 622, 13 Jur. 921, it is quite clear that the causes of action set out in the replication, and which are alleged to have been the causes of action for which the judgment was recovered against the original defendant Young, and for which the defendants entered into the recognizance now sued on, could not have passed and did not pass to the official assignee under the words of our statute "personal estate, property, debts, assets, and effects."

The assignee is to take those interests and rights which are beneficial to the creditors, all property and assets, and all rights of action affecting such property and assets.

"Actions in which the damages are to be estimated by

immediate reference to pain felt by the bankrupt in respect of his body, mind, or character, and without reference to his rights of property, do not pass to the assignee." Per Erle, J., 13 Jur. 928. So also actions founded on merely personal service performed since the assignment do not pass to the assignee: *Chippendall v. Tomlinson*, 4 Dougl. 318; *Cook's Bankruptcy Law*, 318; per Cresswell, J., in 13 Jur. 928.

Lord Mansfield, C. J., said in *Chippendall v. Tomlinson*: "The assignees could not hire the bankrupt out." See also *Williams v. Chambers*, 10 Q. B. 337.

As the case now stands, we think the assignee has no right to interfere with the proceedings of the plaintiff.

Whether the money, if it be recovered by the plaintiff, or the goods or lands of the defendants, or of the original debtor, if they be bought in by the plaintiff under his execution, will vest in the assignee, we are not required to determine.

The language of the statute,—and all his personal estate property, debts, assets, and effects which he has "or may become entitled to at any time before his discharge is effected, under this act, *excepting only* such are exempt from seizure and sale under execution"—is very strongly expressed. But that has always been the law of bankruptcy in England, and the many cases in which, notwithstanding the statute, rights and causes of action have been held not to pass to the assignee, has been because they have been considered by the Courts to be exceptions necessarily implied by and engrafted on that branch of the law which related to the administration of the debtor's estate.

If therefore a right of action for assault, or slander, or criminal conversation, or seduction, or misfeasance of a surgeon, attorney, or other person, does not pass to the assignee, but remains vested in the insolvent, because such matters are in no way connected with his estate, and are purely personal to himself, it is difficult to see what right the assignee can have to the fruits of such actions, or why he should take them away from the person who was alone intended to have been benefited by them.

The right of action must be the most barren of all rights to the insolvent if another must reap the fruits of it. It is a farce to give the insolvent the right to sue for his personal labour, and to take away the price of it when it is paid to him. That is both to hire him out and to starve him.

I should therefore very much doubt whether the assignees can or could intervene at any time or in any form to prevent the plaintiff getting the full benefit of the cause of action which remained in him, and which never passed to the assignee.

The plaintiff is entitled to succeed on this demurrer.

*Judgment for the plaintiff.*

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WADDELL V. MCCOLL ET AL.

*Appeal from County Court—Bond—Condition.*

Declaration on a bond, conditioned to abide by the decision of the C. P. in a County Court suit of W. v. M., appealed to that Court, and to pay all moneys and costs, as well of the suit as of the appeal. Breach, nonpayment of all sums of money and costs awarded and taxed to W. in the suit: that he recovered judgment in the County Court against M. for \$220 damages and \$72 costs, which defendant had not paid. Plea, that no decision of the said cause was ever made by the C. P., nor any money or costs awarded or taxed by that court to the plaintiff. *Held*, plea good, for the condition was only to abide by the decision of the C. P., and if the appeal was not heard and the refusal to entertain it was a decision of that court, it should have been so alleged.

The plaintiff replied, that the sums of \$270 and \$72 were, within the true intent and meaning of the condition, awarded and taxed to the plaintiff as and for his moneys and costs which M., within such intent and meaning, was liable to pay. *Held* bad, as tendering an issue on matter of law.

DEMURRER. Declaration, that defendants by their bond became bound to the plaintiff in the sum of \$700, to be paid by the defendants to the plaintiff, conditioned that the said Archibald McColl should abide by the decision of the Court of Common Pleas, of a certain suit pending in the County Court of the united counties of Northumber-

land and Durham, wherein the said Archibald Waddell, the plaintiff herein, was plaintiff, and the said Archibald McColl was defendant, and appealed to the said Court of Common Pleas, and pay all sums of money and costs, as well of the said suit as of the said appeal, awarded and taxed to the said Archibald Waddell. Breach, that the said McColl did not, nor did the said defendants, nor did any or either of them, pay, nor have the said defendants, nor has any or either of them, paid all sums of money and costs of the said suit awarded and taxed to the said Waddell, or any of the said sums of money or costs of the said suit awarded and taxed to the said Waddell, or any part thereof: that afterwards, to wit on the 15th of February, 1869, the said Waddell recovered judgment in the said County Court against the said McColl in the said suit, for \$270 56c. damages, and \$72 26c. taxed costs, and the sum of \$342 82c. was thereupon awarded and taxed therein to the said Waddell as and for his moneys and costs of the said suit, yet neither the said McColl, nor any or either of the said other defendants, though required so to do, have paid the said sum of \$342 82c. so awarded and taxed to the said Waddell in the said suit, or any part thereof, and the same is wholly due and unpaid.

The second count was substantially the same as the first.

Plea, that no decision whatever of the said cause was ever made by the said Court of Common Pleas, nor were any sums of money or costs whatever awarded by the said Court of Common Pleas and taxed to the plaintiff.

Replication, that the sum of \$270 56c. debt, and the sum of \$72 26c. costs, were, within the true meaning, intent, and construction, and according to the condition of said bond, awarded and taxed in the said cause to the plaintiff as and for his sums of money and costs of the said suit, which said sums of money and costs of the said suit the said defendant McColl, within the true meaning, intent, and construction of the said bond, and according to the condition thereof, became and was liable to pay, and which

the said defendants have not nor has either of them ever paid, and which remain wholly unpaid.

Demurrer to the replication, as tendering an issue upon matter of law, and being a departure.

Joinder in demurrer, and notice of the following exceptions to the plea :

1. That the said plea is no answer to the declaration ;
2. That it does not in any way answer the breach assigned ;
3. That it answers a breach of the condition of the bond not assigned or complained of in the declaration ; 4. That the declaration shews that the bond therein mentioned contained three conditions, namely—1st., that the said McColl should abide by the decision of the said cause by the said Court of Common Pleas : 2nd., that the said McColl should pay all sums of money and costs of the said suit awarded and taxed therein to the said Waddell ; 3rd., that the said McColl should pay all sums of money and costs of the said appeal awarded and taxed to the said Waddell ; and the plaintiff charges and assigns the breach of only one, namely, the second of the said conditions, and the defendants' said pleas do not in any way answer the said breach assigned, but profess to answer the breach of the said third condition, a breach not assigned, charged, or complained of.

During this term the case was argued.

*Spencer*, for the plaintiff, referred to *McColl v. Waddell*, 19 C. P. 213.

*S. M. Jarvis*, contra.

WILSON, J., delivered the judgment of the Court.

The replication is certainly bad for putting in issue matter of law. How can the jury tell whether the debt and costs were within the true meaning, intent, and construction of the condition of the bond ? This is to ask them to decide a question of law : *Anonymous*, Lofft 43 ; *Ashby v. Harris*, 1 Jur. 776 ; *Eyre v. Shelley*, 8 Dowl. 190 ; *Berton v. Lawrence*, 5 Ex. 826 ; *The Queen v. Nott*, 4 Q. B. 768.

The question is whether the pleas are good.

The declaration is consistent with the appeal being still in the Common Pleas, and of Waddell having got a judgment by some means in the County Court, or with the appeal having been withdrawn by consent, or with the Court having declined to entertain it.

The condition is not to prosecute without delay, in which case an action would lie on the bond, although the appeal was still undetermined, but to abide by the decision of the Common Pleas, and pay all sums of money and costs, as well as the suit as of the appeal, as should be awarded and taxed to Waddell.

The Court of Common Pleas has for some cause not decided the appeal yet, and perhaps never may.

If the Superior Court pronounce a decision, it is in the form of a "direction to the Court below touching the judgment to be given in the matter as the law requires, and shall also (*i. e.* the Superior Court shall also) award costs to either party in their discretion," &c.

This is the provision of the statute. The condition as set out in the declaration is in the form prescribed by the statute.

The form is not very plain, but the words extracted above shew that it is the Court of Appeal that is to award the costs; and this it is admitted the Court of Appeal has not done.

The defendants never engaged to pay any sum whatever excepting that which the Court of Appeal directed them to pay. They did not agree to secure to the plaintiff the judgment of the County Court, and this it appears is what they are sought to be made liable for.

It may be a hardship on a person who has recovered a verdict in a County Court to be stayed in his suit by the form of an appeal, and when brought into the Court above, to have it determined that the matter is not before it, because for some cause it is not appealable, and so not within its jurisdiction. But this must be amended by legislation.

If the refusal to entertain the appeal be a decision by the Superior Court, the decision should be alleged to have been pronounced. If it be not, the defendants are not liable, for they never engaged to do more than to abide by the decision.

We think judgment must be for the defendants on the sufficiency of the pleas.

*Judgment for defendants.*

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IN RE JOHNSON AND THE TRUSTEES OF SCHOOL SECTION  
No. 13 IN THE TOWNSHIP OF HARWICH.

*School Trustees—Judgment against—Mandamus to levy rate.*

In 1862 the trustees of a school section issued their warrant to J. to levy a rate. One S., who was upon the roll, claimed exemption as belonging to a Roman Catholic Separate School, and in 1863 recovered against J. in replevin for his goods which J. had seized. J. in 1866 sued the trustees of that year for indemnity, and recovered judgment, the action being defended. The trustees issued their warrant to levy a rate, including this judgment, and about \$100 was levied and paid over to J., but many of the rate-payers refused to pay the proportion imposed for J's claim. J. then, in 1869, having had a *fi. fa.* on his judgment returned no goods, applied for a mandamus to the trustees to levy the balance due to him, none of these trustees having been trustees in 1866.

The application was refused, on the ground that the Court might enquire into the grounds of the judgment, and that the applicant was bound, but had failed, to shew clearly that it was recovered in a justifiable litigation.

*Quære*, however, whether apart from this the application could be granted, for the effect would be to levy a rate on a different body to pay the debt of a previous year.

IN Michaelmas Term last *Robinson*, Q.C., obtained a rule calling on the trustees to shew cause why a writ of mandamus should not be issued, commanding them to apply to the Township Council of Harwich, or to employ their own lawful authority, as they might judge expedient, for the levying and collecting by rate, and to pay to said Johnson, a sufficient sum to pay the balance due upon a judgment recovered by him against the trustees, in the County Court of Kent, on the 2nd of November, 1866; and why they should not pay the costs of the application.

The papers filed in support of the application stated that judgment was recovered for \$228.07 damages and costs, and that a writ of *fi. fa.* against goods, which was issued thereon and delivered to the sheriff, was returned by him "as he alleged, without having been able to levy on any goods of the defendants, and as he believed unable to levy a rate on said school section to pay same:" that the sum of \$135.80, and interest from the 27th of February, 1868, still remained unpaid on the judgment: that payment of it had frequently been demanded of the trustees: that on the 10th August, 1869, the three trustees (at that time) of the section were each personally served with a copy of the notice and demand annexed, but they had refused to strike a rate to pay off said judgment, and on the 10th of November instant the answer annexed was received from them.

The notice and demand were to strike a rate to levy the above balance within three months, and that unless they did so in that time, and paid the amount claimed in one week thereafter, this present application would be made.

One of the trustees wrote an answer, that he was willing to strike a rate if the applicant would indemnify him for doing so, but the other trustees were unwilling to do so, as they did not deem it to be legal.

The affidavit filed by the trustees stated that in the year 1862 the then trustees, of whom the applicant was one, issued their warrant and collector's roll to the applicant, to levy an amount from the school section to defray the expenses of the section for that year, and appointed the applicant to collect the same: that at that time it was notorious that several of the inhabitants of the section claimed to belong to the Roman Catholic separate school, and to be exempt from taxes for the public general common school, notwithstanding which the trustees included all the names of the inhabitants so claiming to belong to the Roman Catholic separate school in their roll, and directed the collector to levy from the said persons so claiming to belong to the Roman Catholic separate school a due proportion of the expenses of the said school, according to the sums they were

respectively rated for on the assessment roll of the township for that year: that the applicant, in pursuance of the warrant and order, proceeded to seize and sell the property of the said persons so claiming to belong to the Roman Catholic separate school, and among others that of one Edwin L. Stoddard: that Stoddard in 1863 replevied the goods so seized, the applicant defended the suit, and a recovery was had against the applicant: that the applicant in 1866 brought an action against the then trustees, who were not nor were any of them the trustees for the year 1862, to recover damages by reason of Stoddard's recovery against him: that the trustees defended that action, but a recovery was had against them: that the trustees for 1866 thereupon issued their warrant and collector's roll to one George Gibson, one of the then trustees, to levy a rate to satisfy the applicant's judgment, who duly made a return to the clerk of the township of the rates and amounts assessed by the trustees against the lands of non-residents of the section by their warrant and roll; and that the warrant and roll also included a sum to cover the teacher's salary and other expenses of the section for the year 1866: that the township council paid the amount rated against the non-resident lands to cover the teacher's salary and other incidental expenses for the year, but refused to pay the amount rated against the non-resident lands to pay the applicant's judgment, on the ground that the liability by the applicant had been incurred by his attempting to levy a rate in 1862 against the members of the Roman Catholic separate school, which was not authorized, and the judgment he had obtained against the trustees was in respect of that act: that some of the inhabitants paid their share of the rate bill for 1866, to the amount of about \$100, which sum was paid to the applicant: that the rest of the inhabitants refused to pay the proportion of the rate to satisfy the judgment, though they paid that part of it required for the teacher's salary and incidental expenses, the refusal aforesaid being for the same cause as that which was assigned by the township council; and the collector

has hitherto neglected to levy on those who have refused to pay : that none of the trustees for 1869 were trustees in 1866.

In the same term *Kingstone* shewed cause. The mandamus will not be ordered unless it appears there are no goods to satisfy the judgment which can be reached by execution. It does not appear that there are no lands, though a return had been made of no goods : *Hughes v. The Mutual Fire Insurance Co. of Newcastle*, 11 U. C. R. 241, 13 U. C. R. 153 ; *Scott v. School Trustees of Burgess and Bathurst*, 19 U. C. R. 28 ; *The Queen v. Ledgard*, 1 Q. B. 616 ; *The King v. The Margate Pier Co.*, 3 B. & Al. 220 ; *Re Quin*, 23 U. C. R. 308 ; *The Queen v. The Victoria Park Co.*, 1 Q. B. 288. No new rate will be ordered while the old one has not been collected. Some persons have paid under the former rate ; a new rate will compel them to pay over again. The judgment is not conclusive on this motion, and the Court can look to see upon what it is founded. It is a judgment which should never have been recovered against the trustees as a corporation ; they may have been personally liable who ordered the illegal seizure to be made by the applicant on Stoddard : *The King v. The East India Co.*, 4 M. & S. 283-4 ; *Stark v. Montague*, 14 U. C. R. 473 ; *Tapping on Mandamus*, 69. This, too, is an old debt, and different parties should not be compelled to pay it : *Woods v. Reed*, 2 M. & W. 784.

*Robinson*, Q.C., supported the rule. It has been shewn there were no goods. The trustees have no lands liable to execution ; and if they had, why should a creditor wait for a twelvemonth before he can sell ? The trustees cannot be allowed now to impeach the correctness and validity of the judgment, though there might have been a question whether it should have been recovered against them as a corporation. But it might be argued, and perhaps successfully, that the trustees could in their corporate capacity indemnify one of their officers for doing an act in support of their rights. He referred to *Regina v. School Trustees*

of *Tyendinaga*, 20 U. C. R. 528, 3 P. R. 43; *Scott v. School Trustees of Burgess and Bathurst*, 19 U. C. R. 28, 33-4.

WILSON, J.—I think we may on this application be informed how, and in respect of what claim or liability, the judgment was recovered against the trustees in their corporate character, which the applicant desires this Court to help him to get paid.

And it appears to me not to be explained so that the Court can see quite clearly that the litigation was proper and justifiable. I do not say that in no case can the trustees maintain the act of their officers or themselves by litigation either prosecuted or resisted on their part, where their rights are affected. There may be many cases in which it might not only be proper but their peremptory and unavoidable duty to bring or defend an action. Such a case is not shewn here. On the contrary, I infer it was not proper. The proof of the justifiableness of the proceeding rests on the applicant, and he has not supported it: *The King v. Commissioners of Sewers of the Tower Hamlets*, 1 B. & Ad. 232; *Regina v. Mayor of Leeds*, 4 Q. B. 796; *Regina v. Great Western Railway Co.*, 13 Q. B. 327.

There is the further difficulty, that by levying a rate a different body, to a great extent certainly, will be called on to pay the debt of the previous year (assuming it to be a valid debt), which is against the general policy of law in this respect. Most of the cases are collected in *The Queen v. Read*, 13 Q. B. 524. The same rule has been acted on here at different times.

It may be possible that if a mandamus could go, the trustees might be able to direct the levy to be made on those persons who were (assuming the liability) liable then, and who had not paid their share.

There is no case made at present, and I have no confidence, even if the judgment can be shewn to have been obtained by reason of its having been founded on a just, necessary, and reasonable proceeding by and on behalf of the trustees of 1863, that the Court will be able to afford a remedy.

The application must therefore be discharged, and with costs, as the present trustees cannot afford to pay their own charges, and they are strangers to the original motion, and have probably no trust funds to meet the outlay.

MORRISON, J., concurred.

RICHARDS, C. J., not having heard the argument, took no part in the judgment.

*Rule discharged.*

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RUITZ V. THE ROMAN CATHOLIC EPISCOPAL CORPORATION  
OF THE DIOCESE OF SANDWICH.

*Corporation—Power to borrow—8 Vic. ch. 82.*

*Held*, that the Roman Catholic Bishop of Sandwich, incorporated by 8 Vic., ch. 82, as "The Roman Catholic Episcopal Corporation of the Diocese of Sandwich in Canada," had no power to borrow so as to bind his successor; and therefore that the plaintiff, having lent money to such Bishop, which was used in the construction of the episcopal residence and for the purposes of the Church, and taken security for repayment under the corporate seal, was not entitled to recover against the corporation.

The Bishop was described in the instrument as "R. C. Bishop of Sandwich." *Held*, that this variance from the corporate name was immaterial.

DECLARATION.—First count, that by deed under their corporate seal, dated the 1st September, 1862, defendants covenanted with the plaintiff to pay to the plaintiff the sum of \$1,000 one year from date, with interest at eight per centum per annum, semi-annually, but they have not paid the same. Second count, on a similar instrument, dated 1st January, 1863, for the payment of \$1,000 one year from date, with interest at eight per cent. Common counts were added.

Defendants pleaded, 1. To first and second counts, that the alleged deeds in the said counts mentioned are not their deeds, nor is either of them their deed; 2. To the common counts, never indebted.

The cause came on to be tried, before Morrison, J., at the Spring Assizes, 1870, at London, when a verdict was found

for the plaintiff for \$3,133, subject to the opinion of the Court upon the following

CASE.

"1. It is admitted that the Bishop of Sandwich in communion with the Church of Rome, and his successor and successors, is, and before the year 1862 was, constituted the Roman Catholic Episcopal Corporation of the Diocese of Sandwich in Canada, with the same powers as are conferred by the Act of the Parliament of Canada, 8th Victoria, chapter 82, upon the Bishops of Kingston and Toronto, respectively; the diocese of Sandwich having been erected as a new diocese out of the diocese of Toronto.

"2. That Monseigneur A. Pinsoneault was Roman Catholic Bishop of Sandwich during the years 1862 and 1863.

"That on the first day of September, 1862, the sum of \$1,000 was delivered and paid by the plaintiff to the said Bishop of Sandwich, as a loan, repayable in one year from that time, with interest thereon at eight per cent. per annum.

"And on the first day of January, 1863, an additional sum of \$1,000 was delivered and paid by the said plaintiff to the said Bishop of Sandwich, as a further loan, to be repaid in one year from that time, with interest thereon at eight per cent. per annum.

"4. That the said loans were made upon the security of the documents of which the following are copies, and which were given to the said plaintiff by the said Bishop of Sandwich, and are signed by the said Bishop, and under the seal of the said corporation; the originals to be produced upon the argument of the case.

"DIOCESE OF SANDWICH, C. W.,  
"Sandwich, C. W., September 1st, 1862.

"I, the undersigned, R. C. Bishop of Sandwich, do hereby acknowledge to have received from the Reverend Father Ruitz, R. C. Pastor of St. François, the sum of one thousand dollars, as a loan, for one year from date, with interest of 8 per cent., payable semi-annually.

"Given at Sandwich, under our hand and seal, on the day and year as above.

[Seal].

"† ADOLPHE,  
"Bishop of Sandwich."

"\$1,000.

"SANDWICH, January 1st, 1863.

"We, the undersigned, R. C. Bishop of Sandwich, acknowledge having received from the Rev. T. M. Ruitz, the sum

of one thousand dollars, being a loan, payable one year after date, with interest at eight per cent.

"Given under our hand and seal on the day and year as above.

[Seal].

"† ADOLPHE,  
" *Bishop of Sandwich.*"

"5. That the sum of forty dollars was paid on the first day of March, 1863, as six months interest upon the loan of \$1,000 made on the first day of September, 1862, and no payment of interest upon the other sum; and that no part of the principal of either sum has been as yet repaid to the plaintiff.

"6. That the money so received by the said Bishop of Sandwich was appropriated and used towards the construction of the episcopal residence at Sandwich, and for the purposes of the Church in that diocese.

"The question for the opinion of the Court is, whether the plaintiff is entitled to recover against the Roman Catholic Episcopal Corporation of the Diocese of Sandwich in Canada, upon the documents or obligations above set forth.

"If the Court shall be of opinion that the plaintiff is so entitled, then the verdict entered for the plaintiff is to stand, and judgment is to be entered thereon with full costs.

"If the Court shall be of opinion that the plaintiff is not entitled, then a verdict to be entered for the defendants, or a nonsuit, as the Court shall think fit."

*C. Robinson*, Q.C., for plaintiff. The defendants are liable. There is nothing in the charter to prevent the corporation from borrowing, and it is admitted that the money was used for corporate purposes. In *Kent's Com.*, 11th ed., Vol. II., p. 278, note *c*, it is said, "The general rule is, that every corporation has a capacity to take and grant property, and to contract obligations. But these general powers, incident at common law, are restricted by the nature and object of the institution; and, in pursuance thereof, it may make all contracts necessary and useful in the course of the business it transacts, as means to enable it to effect such object, unless prohibited by law or its charter. To attain its legitimate object, it may deal pre-

cisely as an individual who seeks to accomplish the same end. It may \* \* borrow money for such objects," &c. See also *Lindley on Partnership*, 2nd ed., p. 258; *Taylor v. Chichester, &c., R. W. Co.*, L. R. 2 Ex. 356; *Re National Permanent Benefit Building Society, Ex parte Williamson*, L. R. 5 Ch. App. 309; *Consol. Stat. C.*, ch. 5, sec. 6, sub-sec. 24; *Angell and Ames on Corporations*, 3rd ed., p. 234. In *Grant on Corporations*, 633, it is said that "the successor (of a Bishop) it would seem, would be liable on the contract of his predecessor, though not under seal, if the contract were executed and the thing done, or goods delivered, &c., had come to the use of the See, and had not been done or delivered to the Bishop in his private capacity." The mistake in the corporate name is immaterial: *Grant on Corporations*, 145, 146; *Barclay and the Municipality of Darlington*, 11 U. C. R. 470; 2 *Kent Com.*, 11th ed., 292.

O'Connor, contra. The instrument shews the borrower intended to be bound personally, and not as a corporation; the corporate name has not been used. The Bishop had no power to borrow money to bind the corporation. He can, in his corporate capacity, merely hold real estate for the use of the Church, under the Statute. He cannot hold chattels at all, unless as an individual: *Grant on Corporations*, 64, 626, 630. He also referred to *The Great Western R. W. Co. v. The Preston and Berlin R. W. Co.*, 17 U. C. R. 477; and *Hill on Trustees*, 571.

WILSON, J., delivered the judgment of the Court.

The name of the defendant as a sole corporation, by the Statute, is, "The Roman Catholic Episcopal Corporation of the Diocese of Sandwich in Canada."

The instruments declared on do not follow this name literally. They are in the name of the "Roman Catholic Bishop of Sandwich," and they are executed in the name of "† Adolphe, Bishop of Sandwich."

The Statute incorporates the person "being Bishop" of the diocese, and his successors: sec. 1. And it provides

that when any new diocese is erected, "the Bishop" of the diocese, and his successors, shall have the same powers as are by the Act conferred on the Bishops of Kingston and Toronto: sec. 9.

The ordinary common law mode of designating a Bishop in his corporate character was by giving him his Christian name and the name of his See, with the addition of the words of succession, as, "John, Bishop of Norwich, and his successors," though the politic name alone was sufficient, as "Bishop of Norwich, and his successors:" *Co. Lit. 3 a, 94 b*, note (5); *Grant on Corporations*, 632, 633.

The name, we think, sufficiently describes the corporation sued as a defendant: *Master, &c., of Sussex and Sidney College v. Davenport*, 1 Wils. 184; *Attorney General v. Mayor, &c., of Rye*, 7 Taunt. 546; 10 Co. 124 *a*, note B, Fraser's ed.; *Grant on Corporations*, 146, and note *b*; and the authorities referred to in *Kent's Com.*, and 11 U. C. R. 470, on the argument.

If these instruments had been made to the Bishop, though in his corporate name, they would, if not paid in his lifetime, have gone to his personal and not to his corporate representative: *Grant on Corporations*, 629, and following pages; and even though they had been payable to him and his successors, for there is held to be no succession as to personalty in sole corporations.

But this is the case of a deed made by a corporation sole, and not to one, and the question is, whether he can make it to bind his successors?

That must depend on the Statute, and the scope, purposes, and object of the incorporation.

The Statute declares the corporation shall have power "to have, hold, purchase, acquire, possess, and enjoy, for the general use or uses eleemosynary, ecclesiastical, or educational of the said Church \* \* \* any lands, tenements, or hereditaments, within the Province of Canada; and the same real estate, or any part thereof, from time to time (by and with the advice and consent hereafter mentioned), to sell or exchange, alienate, let, demise, lease, or otherwise

dispose of, and in case of sale to purchase other real estate in lieu of that sold with the proceeds or purchase money arising from such sale, and to hold and enjoy such newly purchased or exchanged estate or estates for the religious, eleemosynary, ecclesiastical, or educational purposes aforesaid."

There is nothing here enabling or rendering it necessary for Bishops to borrow money so as to charge their corporate property or their successors, and the various cases decided as to this point, with respect to mining and other purposes, bear directly on the question: *Gilbert v. McAnnany*, 28 U. C. R. 384.

The parson could at common law charge his benefice so as to bind himself and those claiming under him, but not to bind his successors: *Doe d. Cates v. Somerville*, 6 B. & C. 126; *Doe d. Brammall v. Collinge*, 7 C. B. 939.

It would not be proper to subject the Church property, held for "religious, eleemosynary, ecclesiastical, or educational purposes," to the payment of this money, unless it was quite clear that it was a charge lawfully made, and binding upon the corporation. We think it was not. It is the personal obligation of the borrower of the money.

This is a result perhaps not at all contemplated by either of the parties to the transaction, but it is to be hoped, if the plaintiff has lost the security which he no doubt thought he had got, that the borrower will still see him paid, though the security has failed.

There must, in our opinion, be a nonsuit entered for the defendant.

*Rule absolute.*

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## SNIDER V. THE CORPORATION OF THE COUNTY OF FRONTENAC.

32 Vic. ch. 6, sec. 126, O.—*Sale under treasurer's warrant—Liability of County.*

Section 126 of the Assessment Act, O., 32 Vic. ch. 6, directs, that when the county treasurer is satisfied that there is distress upon any lands of non-residents in arrear for taxes, he shall issue a warrant *under his hand and seal* to the collector of the municipality to levy. The warrant was tested "Given under my hand and seal, being the corporate seal;" and the seal bore the same form, emblem, legend, &c., as the County seal. The collector sold the plaintiff's goods under it, but it was not shewn to have been authorized by the county council, nor had they received the proceeds of the sale:

*Held*, that they were not liable in trespass or trover.

DECLARATION—First count, for seizing and taking plaintiff's goods; second count, for converting the same goods.

Plea. Not guilty.

The cause was tried at the last Spring Assizes at Kingston, before Galt, J., when a verdict was rendered for the plaintiff, damages \$250.

The evidence to connect defendants with the wrong complained of was, first, a warrant addressed to Sidney William Davy, collector of taxes for the Township of Portland, in the County of Frontenac, as follows: "Whereas taxes are due and in arrear on non-resident lands in the Township of Portland aforesaid, to wit, on lot No. 9 in the 12th concession of said township the sum of \$133.53, and on lot No. 16 in the 14th concession of said township the sum of \$189.29, and which said arrears of taxes against the said lots respectively appear charged in the county treasurer's book in and for the municipality of the Township of Portland; and it being made to appear that there is sufficient distress upon the said lots respectively; therefore you are hereby authorized and required to distrain the goods and chattels which you shall find upon the said lots respectively for the sums so charged against them respectively, and now in arrear and unpaid, and in default of payment of said arrears of taxes respectively, and the lawful costs of such distress or distresses respectively, then that you sell and

dispose of such distress or distresses respectively according to law, for the recovery of the said arrears of taxes respectively, together with your proper costs; and for your so doing this to be your sufficient authority.

"Given under my hand and seal, being the corporate seal, this ninth day of September one thousand eight hundred and sixty-nine.

(Signed) "JOHN IRVINE, [L.S.]  
*County Treasurer.*"

The seal was the defendants' common seal.

There was no authority by resolution of the council to affix the seal as the seal of defendants to the warrant. It was issued by the county treasurer on the representation of Mr. Shibley, who was warden of the county and reeve of Portland, that there was distress on lot No. 16 in the 14th concession of Portland, and he referred to section 126 in the Assessment Act, under which he thought he was authorized to issue the warrant.

The plaintiff occupied 50 acres of lot No. 16 in the 14th concession of Portland, and had lived there eight years, and two other persons occupied the remainder of the lot. The collector, Davy, seized the plaintiff's property and sold it for the arrears of taxes and expenses, and offered to return him a balance, which he declined to receive. All the articles sold did not belong to the plaintiff. There was no plea justifying the sale.

The defendants' counsel moved for a nonsuit on the following grounds:—1. That there is no privity between the collector who seized and sold the property and defendants; the collector seized and sold on the warrant of the treasurer of the county, who issued it on his own mere motion under the statute, and without reference to the defendants.

2. The county treasurer is in no sense defendants' servant or agent in issuing the warrant, and the township collector, who made the seizure and sale, is in no way responsible to defendants. They have no control over him, and he is not their servant.

3. The county treasurer acted in issuing the warrant on his own responsibility, without requiring the concurrence or assent of the defendants. He was not put in motion by them, but acted under authority given to him directly by the statute.

4. The proceeds of the sale of the plaintiff's goods never came into the defendants' hands, but were handed over to the township treasurer of the Township of Portland; the county treasurer never received them.

5. The county treasurer adopting defendants' seal as his own for the purposes of the warrant does not make the issuing of the warrant an act of the defendants, nor are they responsible for any acts done under the warrant; and defendants gave no authority for so using the seal or the warrant.

6. The statute compelled the county treasurer to issue the warrant to the collector; the treasurer as such is not responsible for the acts of the collector contrary to law, unless ratified by the treasurer, which was not done in this case. The mere delivery of the warrant to the collector in his official capacity will not make the treasurer or defendants liable.

The learned Judge directed the jury, that if they were of opinion that the sale was under the authority of the defendants, the defendants were liable, as no justification was pleaded. They found for the plaintiff as already stated, and \$250 damages.

This charge of the learned Judge was objected to.

*Harrison*, Q.C., obtained a rule *nisi* to set aside the verdict and enter a nonsuit pursuant to leave reserved, on the grounds taken at the trial.

*Britton*, shewed cause. The warrant was issued under the Assessment Act of 1869, Statute of Ontario, 32 Vic. ch. 36, sec. 126. The treasurer is appointed by the county municipality, and under section 173 he is bound to give a bond to the municipality for the faithful performance of his duties. The municipality only can avail themselves of this

bond. The collector may be worthless; where then would the remedy be if the corporation are not liable for the acts of its officer. Secs. 110, 115, 118, compel the county treasurer to keep an account of these arrears of taxes. Section 119 makes the county treasurer the only officer to receive them. Sec. 129 authorizes the county council to extend the time for the payment of taxes beyond the three years; no such power is given to the township council. Sec. 156 authorizes the county council to direct that all moneys received by the county treasurer on account of non-resident land tax shall be paid at stated periods to the several local municipalities to which such taxes are due, or to establish a Non-resident Land Fund for the county, and in the absence of any by-law the county treasurer shall pay over to the local treasurer all such moneys when so collected. Sec. 190 directs that all moneys collected for the purpose of being paid to the Receiver General, &c., or for any other specific or public purpose, shall be assessed, collected by, and accounted for, and paid over to, the same person, and in the same manner, and at the same time as taxes imposed on the same property for county or city purposes, and shall be deemed moneys collected for the county, town, or city, so far as to charge every collector, chamberlain, or treasurer, with the same, and to render him and his sureties responsible therefor, and for every default or neglect in regard to the same, in like manner as in case of moneys assessed, levied, and collected for the use of the city, town, or county. By sec. 200 any person aggrieved by the default of the chamberlain or treasurer may recover from the corporation of the city, county, or town the amount due or payable to such person as money had and received to his use. These provisions all shew that the object of the legislature was to protect individuals and make the municipalities liable for the acts of their officers, and to enable the municipalities to recover from these officers on their bonds whatever they have to pay for their neglect or improper conduct. The doctrine of *respondeat superior* should apply here. It is true *Mills v. McKay*, 14 Grant 602, fol-

lowing *Austin v. The Corporation of Simcoe*, 22 U. C. R. 73, held in effect that a purchaser at a tax sale had no right to recover back his purchase money, when the title was bad, from the county municipality. But in *Robertson v. The Corporation of Wellington*, 27 U. C. R. 336, it was held that when the plaintiff, to prevent his lands being sold under the treasurer's warrant for non-resident land taxes, paid the amount to the sheriff under protest, and sued the county for money had and received, the action would lie if the money had been paid over to the county treasurer, as the money belonging to the Non-resident Land Fund was sufficiently the property of the county to warrant such an action. *Scott v. The Mayor, &c., of Manchester*, 1 H. & N. 59; S. C. in Ex. Ch., 2 H. & N. 204, decides that the defendants, a corporation, were answerable for the negligence of their servants in putting down gas pipes within the corporation limits. Here the collector was set in motion by the unjustifiable act of the defendants' servant, and the plaintiff having been injured ought to recover from the corporation: *Add. T. 727-8, 758.*

*Harrison, Q.C., contra.* The action is brought against the defendants as trespassers. The collector was not the defendants' servant at the time, nor is the county liable for the act of the treasurer. The Statute recognizes his independent capacity, and the duty is cast upon him by the Legislature. It is not the duty of the county to collect these taxes; they were occupied lands; and, by sec. 114 of the Assessment Act, if the collector could not collect the arrears of taxes, he was to return the amount in arrear, and the cause thereof, to the treasurer of the municipality. The seal affixed to the warrant is not the county seal; in terms the treasurer adopts it as his seal, and it was not affixed by the direction of the county municipality: *Grant on Corporations*, 64. Nor does it appear that any of the money levied under the warrant was paid over to defendants, so that it cannot be said they have ratified the act of the collector in seizing and selling.

RICHARDS, C. J., delivered the judgment of the Court.

We see no grounds on which this action can be maintained against the defendants under the facts shewn. If the issuing of the warrant under which the plaintiff's goods were seized was authorized by the 126th section of the Assessment Act, then of course no action will lie. If it was not properly issued under that section, then we fail to see how the defendants can be liable in trespass for the illegal act of the treasurer, which he was assuming to do under the authority of the Act of Parliament. The defendants are not authorized by the Statute to issue the warrant referred to; the words of the section are, "Whenever the county treasurer is satisfied that there is a distress upon any lands of non-residents in arrear for taxes, he shall issue a warrant *under his hand and seal* to the collector of the local municipality, who shall thereby be authorized to levy," &c.; and the evidence shews that they did not in fact authorize the warrant to issue. There was no money paid over to them, so that they cannot be said to have ratified the act of the treasurer by receiving the money. How, then, can the defendants be trespassers? If the act complained of was one which, in the general discharge of their duties, they were called on to perform, and they could be said to have authorized the treasurer as their servant to perform those duties for them, they might then perhaps be held liable for the act of their servant in doing that which they in effect had intrusted him to do.

The 128th section of the Statute shews that when the lands are to be sold, the treasurer submits to the warden of the county a list in duplicate of the lands liable to be sold, with the arrears opposite each lot, and the warden is to authenticate the lists by affixing the seal of the corporation and his signature. One of the lists is to be deposited with the county clerk, and the other returned to the treasurer, with a warrant thereto annexed, under the hand of the warden and the seal of the county, commanding him to levy upon the land for the arrears due thereon, with costs. In that case the seal of the corporation is affixed

to the warrant, and the acts to be done seem of a character to fix the corporation more than the issuing of a warrant under the hand and seal of the treasurer by the treasurer alone.

It does not clearly appear how the land, on which the taxes sought to be recovered by the warrant were said to be due, was liable to be assessed as non-resident lands, as appears from the recital in the warrant to have been done. If it was so returned to the county treasurer, it would seem to be a harsh if not an illegal doctrine to apply to the defendants, to make them liable because the treasurer did that which, if he was satisfied there was a distress on the land, he was bound to do in issuing the warrant. If the treasurer was guilty of any want of care or attention to the discharge of his duties, and the injury arose to the plaintiff from that negligence, the question might arise, how far the defendants would be liable for his carelessness, or how far they might be liable if they themselves had not exercised proper diligence in selecting such a person for that office. But that an action of trespass or trover will lie against the corporation on the facts before us does not seem to us to be sustainable on principle, and no authority has been referred to that warrants any such conclusion.

*Rule absolute.*

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MENTON V. LEE, SAWYER, CAROLAN, MCLEAN, PATTERSON,  
AND WEST.

*Trespass and trover—Several defendants—Joint verdict.*

In trespass and trover against five defendants, for taking and converting a steam boiler, it appeared that one defendant, P., had nothing to do with the original taking, but that it had been placed in his yard by the others, or by some of them, not acting in concert with him, and that he had afterwards refused to give it up to the plaintiff. At the trial, the plaintiff's counsel declined to elect, but went to the jury against all the defendants, claiming exemplary damages, and a general verdict was rendered.

The Court ordered a new trial without costs, and refused to allow the verdict to stand against P. alone.

THIS was an action to recover the value of a steam boiler alleged to have been taken by the defendants.

The declaration contained three counts: 1. For conversion of the boiler; 2. Detinue; 3. Trespass. Pleas, Not guilty, to the first and third counts, and *non detinet* to the second count, and a plea traversing plaintiff's property in the goods, &c. Issue.

The cause was tried before Hughes, County Court Judge of Elgin, who sat for the late Mr. Justice John Wilson, at the Spring Assizes, 1869, at Chatham.

It was contended at the trial that the plaintiff was the owner of a steam tug called the "Verner," out of which vessel the boiler in question was taken. A good deal of evidence was given to establish the title of the plaintiff to the vessel, but as the judgment does not proceed upon the question of title, it is unnecessary to refer to it.

The plaintiff's son was called, who stated that in March, 1868, he forbade, on the part of the plaintiff, defendant Lee and others from taking the boiler and machinery out of the vessel, which was then lying at Wallaceburg, on the Sydenham River: that they took the boiler, &c., out of her, and laid them on the bank: that on a subsequent occasion, about two weeks after, he returned, when defendant West, a Division Court Bailiff, was present, and about to sell the goods; witness forbade him selling, and West said plaintiff had better buy them; after this the plaintiff and witness came with sleighs to take the boiler, &c., away, when defendants Sawyer and Carolan came with a crowd of others to prevent them. One Fordham at this time claimed rent for the premises on which the boiler, &c., had been lying, and he and witness had a fight about it. The plaintiff and witness got the boiler on a sleigh, and got it on the ice to take home, when defendant Sawyer and one McDougall had the plaintiff and witness arrested and brought before a magistrate. Defendant McLean drove the sleigh on to West's, the bailiff's, and capsized the boiler into a ditch there, defendants Sawyer, McLean, and Lee, being present and joining in the taking. The following morning the plaintiff brought two teams to carry the boiler away; West forbade them taking it,

saying it had been left in his charge by both parties, *i. e.*, by Sawyer and Lee and plaintiff; the witness stated that plaintiff did leave it in West's charge that night, to be delivered to him next morning, when West forbid him taking it. The plaintiff hitched on his team to the boiler, when West said, "Where are my soldiers," &c., when defendants Sawyer, Carolan, and Lee came, and they unhooked the chain attached to the boiler, plaintiff rehooking it, when West got a whip and struck the horses. Plaintiff and the others got fighting, and a crowd came and drove the plaintiff away. On cross-examination the witness said he had been sent by the plaintiff to forbid West selling the vessel, and when he first went Lee was the only defendant acting, none of the others being then engaged. Three weeks after, there being an advertisement that she was to be sold under a Division Court execution, he went again. This was in February, 1867: he saw only West that time, and then forbade the sale by a notice in writing. The notice was produced, dated 4th April. This, he said, was not the time when Fordham was present, nor the same year that they went after the boiler; he did not see the other defendants at that time. He said that it was in the end of March, 1868, when they went after the boiler: that he saw defendants Sawyer, Carolan, and he thought Lee; defendant Patterson was not there. He also stated that the plaintiff told him he left the boiler in West's charge for the night.

Thomas King was called. He said he went to assist in getting up the boiler in March, 1868: defendants West, Sawyer, Carolan, and McLean, were among the parties; and he said that he heard plaintiff's son's testimony, and that it was substantially correct.

Alexander McDougall, the plaintiff's attorney, was called. He said he was present at the scrape in March, 1868: that Lee, Sawyer, and Carolan were preventing plaintiff taking the boiler, and that West afterwards interfered: that he saw Lee and Mr. McKay take the engine boiler past his place, going in the direction of Patterson's mill yard: that he shortly afterwards went there, and found the boiler

there upset and chained to a tree : that he afterwards went with the plaintiff to Patterson, and plaintiff demanded the boiler, and that Patterson refused to give it up, and ordered plaintiff off the premises. He said this was a few days after the "grand spree." He further stated that the boiler was not being used by Patterson. After the close of plaintiff's case this witness was recalled, to explain the precise time of this demand, and whether it was before the commencement of this suit. He said the demand was made before the action. He said it might have been a few days after the "scrimmage" that the demand was made on Patterson, and that shortly after the demand he went to Sarnia and took out the writ. The action was commenced on the 9th March, 1868.

At the close of the plaintiff's case, it was objected on the part of the defendants that there was no joint trespass proved against the five defendants : that there was no evidence of any particular goods taken, converted, or detained by all of the defendants, and without that there could be no joint verdict : that West had possession, and defendants could not be liable in this action for merely assisting him to keep it : that they did not jointly take or afterwards convert or detain any property specified by the evidence ; and that trover could not lie against any one but Patterson, there being no conversion by any other.

The plaintiff's counsel was asked to elect which of the defendants he sought to recover against, and he said against all. By a Judge's order, dated 13th October, 1868, attached to the record, all further proceedings in the cause were stayed as against defendant West. The plaintiff's counsel refused to consent to leave being reserved, and the trial proceeded, the defendants calling several witnesses, the only testimony touching the taking of the boiler being given by the bailiff West, who stated that on the 18th February, 1867, he first got possession of the vessel, having three executions under which he held her, and as he could not sell her they were renewed from time to time, until the 18th October, 1868 : that the first he

heard from the plaintiff respecting her was on the 4th April, 1867, when he got the notice in writing referred to by the plaintiff's son: that on the 20th March or April, 1867, the boiler and machinery were taken out of her, and defendant Lee and others took the vessel into shallow water, where she sunk, as she could not be kept afloat: that she had been previously sold by him to defendant Sawyer, under interpleader proceedings: that it was on the 12th or 13th February, 1868, the plaintiff came to take the boiler, and witness begged of Lee to protect it: that the witness told the plaintiff that the boiler should not be taken unless he was satisfied in money, or there was a Judge's order; it was then taken to witness's place, defendant McLean driving the team at the request of the constable, and the witness requesting defendants Carolan, Sawyer, and Lee, to assist witness in detaining the boiler: that one or two days after, five or six persons came to his place and went to work to load up and take the boiler away: that he forbade them, and sent a man for assistance, and the boiler was then, at the request of witness, removed to defendant Patterson's yard, he, witness, telling the plaintiff it would stay in his, the witness's, charge until the matter was settled by money or an order of the Court. The witness stated he had no communication with defendant Patterson about it.

The boiler, it appeared, still remained in Patterson's yard.

The learned Judge, in his charge to the jury, told them, that before they found a verdict for the plaintiff against any one or more of the defendants, they must find against such as did in concert any one act towards keeping the goods from the plaintiff, or if they each did separate acts towards a common object in concert at the same time they would be all liable, or such of them as did so would be liable; and that the jury might find for the plaintiff against some, and for the defendants as to the other or others; but in no case to find against the bailiff, as proceedings were stayed as to him.

The jury found for the plaintiff and a general verdict

against all the defendants, except West, and \$1,100 damages.

During the following Easter Term, *Robinson*, Q. C., obtained a rule *nisi*, to set aside the verdict, on the ground, among others, that it was contrary to law and evidence, there being no evidence of a joint conversion and detention by the defendants, or no sufficient evidence to sustain the verdict; and on the ground of misdirection, in the learned Judge directing the jury that there was sufficient evidence to sustain a joint verdict against the defendants.

During the same Term, *Becher*, Q. C., shewed cause, citing *Catterall v. Kenyon and Wife*, 3 Q. B. 310; *Add. T.* 223, 738.

*Robinson*, Q. C., contra, cited *Add. T.* 837, 838; *Nicoll v. Glennie et al.*, 1 M. & S. 588; *Aaron v. Alexander et al.*, 3 Camp. 35; *Sedley v. Sutherland et al.*, 3 Esp. 202; *Tait v. Harris et al.*, 6 C. & P. 73; *Howard v. Newton*, 2 Moo. & Rob. 510; *Lee v. Bayes*, 18 C. B. 599; *Ruthven v. Stinson*, 14 C. P. 185.

MORRISON, J., delivered the judgment of the Court.

After a full examination of the evidence, we think that the verdict obtained in this cause should be set aside, and that there should be a new trial, on the ground, assuming that the right of property is in the plaintiff, that the evidence shews that he was only entitled to recover in trespass against the defendants Lee, Sawyer, Carolan, and McLean. We see no evidence connecting the defendant Patterson with the original taking, or that he was acting in concert with the other defendants; the only testimony affecting the defendant Patterson being that the boiler, by the directions of the bailiff West, was placed in his yard, without any communication to Patterson or with his knowledge, and being so there, some days after a demand was made upon Patterson for the boiler, and that he refused to allow the plaintiff to remove it. That demand and refusal might be evidence to support an action of trover against

him alone, but it is not evidence against him of a joint trespass with the other defendants.

The finding of the jury is a joint verdict against all the defendants upon the whole declaration. At the trial the defendants' counsel pressed the plaintiff to elect against which of the defendants he would go to the jury. He declined to make any election, claiming a right to a verdict against all. On the argument of this rule, Mr. Becher, as I understood, suggested that the verdict should be allowed to stand against the defendant Patterson, and a verdict entered for the other defendants. Mr. Robinson objected to this being done. We do not think we would be justified in doing so, even were we so disposed. It is impossible to say upon what grounds the jury arrived at the amount of damages. The plaintiff's counsel pressed for vindictive and exemplary damages. The defendant Patterson was only liable in trover, and not in trespass, as he had nothing to do with the original taking, and in such case the damages would be the value of the boiler at the time of the conversion. As against the other defendants, the cause of action disclosed was one of trespass, and in the absence of any justification an aggravated case, and the wrongful taking was the gist of the action; and the jury had a right to consider, and most probably considered, the manner in which the boiler was taken out of the vessel and detained from the plaintiff for over eighteen months, and the forcible manner in which it was retaken from the plaintiff and removed to West's place. For damages on account of these acts and detention, Patterson could not be liable.

We therefore think that, as the evidence does not support a joint trespass or a joint conversion against all the defendants, the verdict cannot be supported, and that the rule should be absolute for a new trial without costs.

*Rule absolute.*

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## IN RE McDONOUGH.

*Municipalities divided by a river—Limits of each—Conviction for passing toll-gate.*

The limits of the city of London were defined by the proclamation setting it apart as all the lands comprised within the old and new surveys of the town of London, together with the lands adjoining thereto lying between the said surveys and the river Thames, producing the northern boundary line of the new survey until it intersects the north branch, and the eastern boundary line until it intersects the east branch, of the river:

*Held*, that the city limits extended to the middle of the river; and that a conviction by county magistrates for passing the toll-gate on the city side of the river was therefore bad, as the offence was out of their jurisdiction.

Where two properties or municipalities are divided by a river or highway, the limit of each is, *prima facie*, the centre of the river or road.

*Ferguson*, in Michaelmas Term last, obtained a rule calling upon James Keefer and Thomas Moyle, two Justices for the county of Middlesex, and Warren Jenkins, to shew cause why a writ of *certiorari* should not issue to remove a conviction of the Justices, whereby McDonough was convicted of having, on the 25th October, travelled over the Blackfriars Bridge and the gravel road therewith connected, in the township of London, with a horse and buggy, and refused to pay his toll when demanded by Jenkins, the gate-keeper, and was adjudged to pay the sum of \$10, and \$3.05 for costs, &c., upon the ground that the conviction was contrary to law, the Justices having no jurisdiction over the alleged offence, which, if committed, was committed within the city of London, and that the said Jenkins had no authority to demand toll within the limits of that city, &c.

On the return of the rule, *Snelling*, during Hilary Term last, appeared on the part of the Justices and the prosecutor to shew cause in the first instance, and it was agreed that the argument on this rule should proceed as if on a rule to quash the conviction; the main question raised being whether the toll-gate at which the toll was demanded was within the limits of the city of London; for if so, it was conceded that the Justices, being Justices of the county

of Middlesex, and having no jurisdiction to try an offence committed within the limits of the city of London, the conviction was bad.

A number of affidavits were filed on both sides. On the part of the applicant were several residents of London, who had resided there many years, and were acquainted with the situation of the toll-gate, who all swore distinctly that the gate was situate within the limits of the city, and not in the county of Middlesex; while on the part of the Justices, the affidavits filed to shew the position of the bridge and gate were one made by one of the Justices, the other by the county engineer, who stated that, by the proclamation in the *Gazette*, in 1854, defining the limits of the city, the limits are set out as running to the river Thames, which, as they believe, means to the water's edge, the river itself being, as they believe, wholly in the township, and giving as a reason that the lots in the township, as originally laid out, extended across that branch of the Thames over which the bridge is; and the county engineer stated that the toll bar stands on what is called the city side of the river Thames, but it was placed on the abutment of the bridge: that he recently examined its location, and it stood six feet from where a plumb line would strike the abutment of the bridge, and that on the abutment the gate is placed; and he swore that, if the water's edge on the east side of the river was the boundary between the municipalities, it would be impossible for a vehicle drawn by a horse in going from the city to the county to pass the toll-gate without entering the county.

It is unnecessary for the judgment to refer to the other affidavits.

*Snelling*, for the Justices and the prosecutor.

*Ferguson*, for the applicant, cited *McCannon v. Sinclair*, 2 E. & E. 53; *Lord v. The Commissioners for the City of Sydney*, 12 Moo. P. C. 473; *Rex v. The Inhabitants of Landulph*, 1 Moo. & Rob. 393; *Tay. Ev.*, 5th ed., 133; Municipal Act, 1866, sec. 360.

MORRISON, J.—If we were to decide this case wholly on the affidavits filed, it seems to me that our judgment should be in favor of the applicant, it being very clear that the toll-gate in question was situate within the limits of the city of London, for it is sworn positively by four residents of London that the fact is so, while the affidavits filed on the other side only argumentatively shew that in the opinion of the deponents the toll-gate is within the county of Middlesex, and they refer to and base their belief on the proclamation of the 21st September, 1854, which it is admitted on both sides defines the limits of the city of London.

The general rule seems to be, that where the line between properties is a river or highway, the line extends to the middle of the river or road, and that under a conveyance of land bounded by rivers the boundary extends *usque ad filum aquæ*; and we take it, upon the like principle, and with more force, between municipalities, when their limits are defined as being bounded or divided by a river such as the river Thames, the limits of such a boundary extend by legal operation to the middle of the river; unless there is a manifest intention by the words of the instrument, or, as in this case, the proclamation, to exclude that rule, and to stop at the river's edge, the boundary goes *ad medium filum aquæ*.

In England there are few cases to be found bearing on the subject, no doubt because the point is well settled there and understood; but in the United States there are numerous decisions, and, as said by Mr. *Angell*, in his treatise on Watercourses, 6th ed., sec. 11: "The invariable construction in this country (United States), has been, as it has been for centuries in England, that whenever land is sold and conveyed as being bounded by a watercourse, the watercourse *usque ad filum aquæ* is included. In numerous cases of much importance in this country, it has been declared that the common law on this subject prevailed here, and that conveyances of land bounded on rivers and streams of water (above tide-water) extend *usque ad filum aquæ*." And in the same learned author's work on Highways, sec.

318: "It may be stated generally, that when the boundary given in a deed has physical extent, as (among others) a creek or river, the grantee takes to the centre of the object so given, unless by some specific limitation of the grant the object is excluded." And Mr. *Kent*, in his *Commentaries*, Vol. III., p. 427, says when a stream is used in a grant as a boundary or monument, it is used as an entirety to the centre of it, and to that extent the fee passes.

Now the words of the proclamation setting apart or defining the limits of the city of London are as follows: "All the lands comprised within the old and new surveys of the town of London, together with the lands adjoining thereto lying between the said surveys and the river Thames, producing the northern boundary line of the new survey until it intersects the north branch of the river Thames, and producing the eastern boundary line of the same new survey until it intersects the east branch of the river Thames." In our opinion these lines extend to the middle of the river, and consequently, the river boundary in all its length between those intersecting boundary lines extends to the middle of the Thames; and we see no ground for holding, as contended on the argument, that the words of the proclamation do not restrict the boundary to the water's edge on the eastern side of the river, for the meaning of it is to give the limit to the river, and to make the river the boundary, *i.e.*, the middle of it, and not as restrictive of the boundary to the water's edge.

It was attempted to be urged that, although in a deed or grant such words might carry the limit to the middle, yet in a proclamation such as this it is different. I see no distinction. I see, however, a strong reason why it should have the same effect. If the boundary of the riparian proprietor, whose conveyance was couched in like terms, would by operation of law extend to the middle or thread of the river, I cannot see why the same language used in a proclamation for the purpose of defining the limits between two municipalities should not have the like effect. Now the toll-gate in question, upon the statement of the parties

opposing this application, was situate on the east of the river; that is, on the abutment of the bridge on the London side of the river. It is therefore clear the offence was committed within the city limits; and as it is conceded the Justices had no jurisdiction, the conviction is bad and must be quashed.

WILSON, J., concurred.

RICHARDS, C. J., not having heard the argument, took no part in the judgment.

*Conviction quashed.*

### LEE V. HOWES ET AL.

*Sale of land under execution—Defects in process—Sale of equity of redemption—Certificate of discharge of mortgage.*

The defendant in ejectment claiming through a Sheriff's sale under execution, it appeared that a *fi. fa.* lands issued 6th September, 1866, and was returned 17th October, 1867, lands on hand for \$1 and no lands for the residue; but nothing had been done and no lands advertised under it. On the same day a *ven. ex.* and *fi. fa.* residue was delivered to the Sheriff, who advertised as if under the original writ and sold the lands in question on the 2nd May, 1868. There was a mortgage upon it, which defendant, the purchaser, paid off on the same day, and took a certificate of discharge in the usual form, stating that the mortgagor had paid the money due; not such a certificate as is provided for by the C. L. P. A. sec. 258, on sale under execution of a mortgagor's interest.

*Held*, that the sale could not be supported, for the original writ had expired with nothing done under it, and the *ven. ex.* and *fi. fa.* residue had not been a year in the Sheriff's hands before the sale; and moreover he had assumed to act under the original *fi. fa.* and the *ven. ex.*, not the *fi. fa.* residue.

*Semble*, that the want of proper advertisements would not have avoided the sale.

*Sem e.* also, that the taking the certificate of discharge as stated could not defeat the purchaser's title by vesting the mortgagee's estate in the mortgagor, but that it would enure to the benefit of such purchaser as the mortgagor's assignee.

EJECTMENT for the south half and north-west quarter of lot 25, and the west half of lot 26, in the fourth concession of Hinchinbrooke.

The plaintiff claimed as one of the heirs of John Lee, and by deed from the other co-heirs.

Defendants claimed by deed from the Sheriff to defendant George Howes, dated 2nd May, 1868.

The plaintiff's *primâ facie* title was admitted. For the defendant the following documents and facts were proved and admitted:—

A judgment in the County Court of Frontenac, William Judge, plaintiff, against John Lee, defendant (the present plaintiff), for \$124.83, entered 8th August, 1866. A *fi. fa.* against goods issued thereon, 16th August, 1866, and returned.

A *fi. fa.* against lands was issued 6th September, 1866, delivered to the Sheriff on the 17th January, 1867, and returned 17th October, 1867, lands on hand for \$1, and no lands for residue. A *ven. ex.* and *fi. fa.* against lands for residue was issued and delivered to the Sheriff on the 17th October, 1867. The Sheriff sold this land on the 2nd May, 1868, and conveyed it by his deed of that date, registered 4th May, 1868, to George Howes, the purchaser.

The mortgagee of the land, who held by deed of mortgage from John Lee, the plaintiff, dated 12th November, 1866, on the 2nd May, 1868, received his mortgage money in full from the purchaser, and gave a certificate of discharge in the ordinary form, stating that the mortgagor had paid the money.

The lands were first advertised as lots 24 and 25, in the fourth concession, in the *Gazette* of the 26th October, 1867. The error was corrected, and a new advertisement for lots 25 and 26, was first inserted in the *Gazette* on the 15th February, 1868.

There was no advertisement in any local paper, but an advertisement was put up, either inside of the Sheriff's office or on the wall of the office of the Clerk of the Peace, outside, and not otherwise advertised. The Sheriff said the notice was first put up in his office on the 27th January, 1868.

It was contended by the plaintiff's counsel at the trial, that the Sheriff's sale was void, because the *fi. fa.* against lands expired before it was returned, and before the lands were advertised, or any thing done by the Sheriff in execution thereof: that the sale could not be supported under

the *ven. ex.* and *fi. fa.* for residue, because it was not in the Sheriff's hands for twelve months before sale: that the Sheriff's deed referred only to the *ven. ex.*, and not to that part of the writ relating to the *fi. fa.* for residue: that the *ven. ex.* is not a separate writ, but a continuation of the previous *fi. fa.*, and the *fi. fa.* had lapsed: that the return of lands on hand was bad, because the writ had expired; no lands were in fact seized, nor any lands specified as seized: that the sale was not legally advertised, not having been advertised in a local newspaper, or in the office of the Clerk of the Peace, or on the door of Court House, as required by Statute

A verdict was entered for defendants, subject to the opinion of the Court, who might order a verdict to be entered for the plaintiff, if the Court should be of opinion he was entitled to succeed, the Court having power to draw all inferences of fact.

In Hilary Term last the case was argued.

*Britton*, for the plaintiff. The advertisement of lands under a *fi. fa.* against lands is a sufficient commencement of the execution of the writ to enable the same to be completed by a sale and conveyance: C. L. P. Act, sec. 268; but the advertisement must be made while the writ is current: *McDonell v. McDonell*, 9 U. C. R. 259. An erroneous advertisement while the writ is current cannot be cured by a correct advertisement after the writ has expired: *Doe d. Burnham v. Simmonds*, 9 U. C. R. 436. There must be an advertisement in the *Gazette* while the writ is current; an advertisement in a local paper will not do: C. L. P. A. sec. 268; *Hazlitt v. Hall*, 24 U. C. R. 484; *Bank of Montreal v. Munro*, 23 U. C. R. 414; *Paterson v. Todd*, 24 U. C. R. 296. There was no proper local advertisement by publishing in a private newspaper, or by putting up a notice in the court house: sec. 267; *Paterson v. Todd*, 24 U. C. R. 296. The Sheriff's deed recites the original *fi. fa.* against lands and the *ven. ex.* The sale was therefore made under them, and if so the sale was void. George Howes should have got a certificate of discharge of the mortgage when he paid it, according to C. L. P. Act,

sec. 258, whereas he got a common discharge, stating that Lee, the mortgagor, had paid the money. The effect was to vest the legal estate in Lee, which the mortgagee had formerly held: Ontario Act, 31 Vic., ch. 120, sec. 60.

*Robinson*, Q. C., contra. So far as regards the validity of the sale there need be no advertisements at all; the Sheriff may be liable for not advertising, but the sale will be valid: *Osborne v. Kerr*, 17 U. C. R. 141; *Paterson v. Todd*, 24 U. C. R. 296. George Howes, the purchaser, was a stranger to the proceedings prior to the sale, and is not affected by the alleged irregularities of advertisement: *Delisle v. DeWitt*, 18 U. C. R. 158; *Leith R.P.Stats.*, 321-5. The defendants contend, though nothing was done under the original *fi. fa.* against lands, that the sale is good, because after the *ven. ex.* and *fi. fa.* for residue issued there was in fact an advertisement under it. The Sheriff's deed recites that writ: *Campbell v. Delihanty*, 24 U. C. R. 236. The strongest case against the defendants is *Gardiner v. Juson*, 2 E. & A. 188; but in that case there was no advertisement under the *fi. fa.* lands for residue, while in the present case there was. He referred also to *Fields v. Livingston*, 17 C. P. 15; *Doe d. Hagerman v. Strong*, 4 U. C. R. 510; *Doe d. Meyers v. Meyers*, 9 U. C. R. 465; *Ch. Arch. Prac.* 603, 606, 679, 680. It may be that the only person who can claim the certificate under sec. 258, is a person who is the legal purchaser; and George Howes is such a person.

WILSON, J.—The facts shew that while the original writ against lands was in force nothing whatever was done under it. The return of lands on hand to the value of \$1 was therefore untrue.

The *ven. ex.* issued on the return was inoperative, for there was no land whatever on hand to sell.

This writ contained the usual additional precept to levy of the debtor's lands for the residue of the debt. The *fi. fa.* residue issued, as before stated, on the 17th October, 1867

This advertisement as to lots 24 and 25 was published in the *Gazette* on the 26th October, 1867; and the corrected advertisement as to the lots—that is, of 25 and 26—was published in the *Gazette* on the 15th February, 1868.

If the last advertisement can apply at all to the *fi. fa.* for residue, then, according to some of the cases cited, there was a sufficient commencement of execution of the writ by the publication being in the *Gazette*.

If the notice put up in the court house on the 27th January, 1868, be sufficient, though no publication was made in the *Gazette*, then that putting up may be a sufficient commencement of execution, according to some of the decided cases.

The difficulty is to maintain this as a good sale, notwithstanding the advertisements are held to have been perfect, and the *fi. fa.* as to residue is held to have been an operative writ to bind the lands which were advertised and sold, because the sale was made on the 2nd of May, 1868, long before the Sheriff had had the writ twelve months from the day on which it was delivered to him.

The original was a spent writ. The second writ, under which alone proceedings were taken, cannot support a sale made before the time provided for by the statute.

As nothing was done under the first writ, and as proceedings had to begin to be taken when the second writ was given to the Sheriff, that writ should have run a year before the sale was made.

It appears to me, if the only objection were as to the advertisements, that the sale might be maintained.

But, in addition to the one already stated, it does not appear that the Sheriff did in fact advertise or give notice under any other writ than the original *fi. fa.* and *ven. ex.*, or that he ever thought of or intended acting under the *fi. fa.* for residue.

The premature sale shews also that the Sheriff was proceeding under the first writ, not the last; and although the power he had in truth to exercise is the one which may in many cases be assumed to have been the one he

did exercise, the facts and course of action must be such as will support the assumption desired to be made.

I see nothing here which can warrant us in saying that that which the Sheriff did do he could lawfully have done under the *fi. fa.* for residue.

If the Sheriff's deed be of no effect to the purchaser, he can make nothing of the payment or certificate under the mortgage.

If the Sheriff's deed had been a valid title as to the equity of redemption, there might have been a difficulty in the way of the purchaser getting the immediate possession of the land, when he had not apparently acquired the title of the mortgagee, but had registered a certificate which stated that the mortgagor himself had paid the debt.

If the mortgage had not been paid at all, the purchaser of the equity of redemption could have turned out the mortgagor, for as against him the purchaser would have a sufficient title to the possession.

If the purchaser had paid the mortgagee, and had got a certificate that he, *the purchaser*, had paid the money due on the mortgage made by the mortgagor, his title would have been perfect by the statute.

But what position is the purchaser in when he does not redeem the mortgage, but the mortgagor does so; or the purchaser, as in this case, has unadvisedly taken and registered a document which states that the mortgagor has redeemed the mortgage?

The mortgagor cannot deprive the purchaser of the title he had acquired of all the mortgagor's title to and interest in the land; that purchase still remains, whoever pays off the mortgage. The effect may be, and probably is, to perfect the purchaser's title at law, though he never paid a shilling of the mortgage debt.

The Statutory provision, that the purchaser might get the special certificate in his own name, as the one who paid off the debt, was not the whole purpose of the Act. It was to compel the Registrars to act upon the certificate

"to the same extent as if the same had been given to the mortgagor"; *for such a certificate*, it is declared, given to the purchaser, is to have the like effect as if given to the mortgagor.

In any case, I should be inclined to think that a mortgage certified and discharged would enure to the benefit of the assignee of the equity of redemption, at law and in equity.

If, however, the mortgagor, or some one for him, paid off the mortgage, and inadvertently acquitted the debt and mortgage, by certificate and registration of it, there would, I apprehend, be some mode of establishing the money so paid off as a charge or lien on the land in equity.

In my opinion, the acquittance of the mortgage debt and the mortgagee's interest, by the certificate in question, and the registration of it, as if it had been a payment by the mortgagor, would not, if the purchaser's title had been maintainable in other respects, have defeated his title acquired by purchase of the equity of redemption, but would rather have enlarged and perfected his title by the removal of the prior disability.

The statement in the certificate that the mortgagor had paid the debt would not vest in him the title, if he had then no title on which it could attach. Such a proceeding is as "valid and effectual in law as a release of the mortgage, and as a conveyance to the mortgagor, his heirs, executors, administrators, or assigns, or any person lawfully claiming by, through or under him or them, of the original estate of the mortgagor."—Ontario Act, 31 Vic. ch. 20. sec. 60.

The mortgagor certainly could not defeat his conveyance of the equity of redemption to another for value, by paying off the mortgage debt, and getting a certificate to that effect and registering it. He would strengthen the title of his assignee, not defeat it. And I think the same rule applies, in like manner, in favour of the assignee by operation of law, as the purchaser at Sheriff's sale under execution against the mortgagor or the assignee in insol-

veney, and however or by whomsoever the money may have been paid, or be stated to have been paid.

This would have been no impediment in the purchaser's way, but I think his title, for the reasons before stated, cannot be supported, and that the postea must be delivered to the plaintiff.

MORRISON, J., concurred.

RICHARDS, C. J., not having been present during the argument, took no part in the judgment.

*Judgment for plaintiff.*

ALEXANDER MCGREGOR, AND ISABELLA, HIS WIFE, AND  
WILLIAM HEPBURN SCOTT, V. JOSEPH LARUSH.

*Ejectment—Statute of Limitations.*

In ejectment, it appeared that B., the patentee, agreed to sell the land, in 1837, to A. R., giving him a bond for a deed. A. R. took possession, and died on the land in 1839. His widow then went to Scotland, and in 1840 his brother, P. R., came out and took possession, with the knowledge of B., to whom he paid the balance of the purchase money. In 1842, his mother, with her grandchild, the daughter of A. R., came out and lived with P. R. until 1850, when he sold out to his mother, who remained until her death in 1854, and devised it to her daughter, who died, leaving the defendant, her husband, in possession. The plaintiffs claimed under the heir of the patentee, and under the heirs of A. R.

*Held*, that they were barred by possession; for as to the patentee, he had been out of possession since 1840, when P. R. entered with his knowledge; and as to the heirs of A. R., he, A. R., had never the legal estate, and there was no proof that P. R. had entered under them or recognized their right.

There was some evidence of an offer by defendant to purchase plaintiffs' claim, but *held*, that this could avail only if defendant had no title, not to defeat a good title.

EJECTMENT, to recover the east half of lot 17 in the second concession of the township of Otonabee, in the county of Peterborough. The action was commenced on the 22nd May, 1869.

Isabella McGregor and Alexander McGregor, as her hus-

band, claimed title to an undivided moiety of the lands in the writ of summons mentioned, as co-heirs-at-law with one Elizabeth Andrewlina Dixon Robertson (now the wife of John Armour), of one Andrew Robertson, deceased, who at the time of his death held the said lands as tenant thereof of one Thomas Bailey, now deceased, who was the patentee thereof from the Crown; and the said other plaintiff, William Hepburn Scott, claimed the other undivided moiety of the said lands, under and by virtue of a deed of bargain and sale thereof from the said Elizabeth Andrewlina Dixon Armour and John Armour, her husband, as such co-heiress-at-law as aforesaid. They also claimed title by virtue of a deed from Kate Rowed, heiress-at-law of Thomas Bailey, who was the patentee of the Crown.

Defendant, by his notice, dated 20th September, 1869, besides denying the title of the plaintiffs, claimed title to the land as tenant by the curtesy, his deceased wife, Christina LaRush, having borne him issue capable of inheriting, the said Christina LaRush, formerly Christina Robertson, having been entitled thereto as devisee of her mother, Christina Robertson, who claimed the same under one Peter Robertson, whose possession of the lands commenced more than twenty years before the commencement of this suit.

The cause was tried at the last Fall Assizes, at Peterborough, before Morrison, J., without a jury.

It was admitted at the trial as follows:—

1. That Thomas Bailey was patentee of the Crown, by patent issued on the 13th April, 1826;
2. He died about 1857, leaving Kate Rowed, his only child and heiress-at-law, surviving him, she being a widow;
3. That she conveyed the land to plaintiffs, in fee, in December, 1868;
4. Thomas Bailey, on the 8th September, 1837, gave a bond for a deed of the lot in question;
5. Under which Andrew Robertson took possession in the fall of 1837, and continued in possession until the time of his death;

6. That he died in the year 1839, in possession, leaving surviving him Isabella Robertson, his daughter, now Mrs. McGregor, one of the plaintiffs ;

7. Andrew Robertson's widow went to Scotland, leaving the land, and taking with her her said daughter Isabella, and in Scotland the said Andrewlina Dixon Armour was born, being a posthumous child of the said Andrew Robertson ;

8. In the year 1840, Peter Robertson and Christina Robertson, the latter afterwards the wife of the defendant, came to Canada, and lived on the lands in question from thence until as hereinafter mentioned ;

9. That in 1842, Mrs. Elizabeth Robertson, mother of Andrew Robertson, came from Scotland to the land in question, with her son, William Robertson, and the plaintiff Isabella McGregor, and joined Peter and Christina Robertson on the land for two years, when William Robertson bought a place, and his mother and Isabella McGregor went and lived on it with him for about three years. This was in the neighbourhood of the land in question ;

10. That Elizabeth Robertson and Isabella returned to the land in question, and lived with Peter and Christina until 1850, when Peter, who had resided on the land until this time, sold to his mother Elizabeth, and left her in possession ;

11. That after the return of Elizabeth and Isabella, Isabella lived on the land until after the death of Christina LaRush, hereafter mentioned, except for a time spent in service ;

12. That Elizabeth Robertson executed a will, dated 10th December, 1853, and died about the beginning of 1854 ;

13. That Christina Robertson and defendant intermarried after the death of Elizabeth, and that Andrew R. LaRush was born, issue of that marriage, survived his mother, and is now alive ;

14. Christina Robertson resided on the land in question,

from the year 1840 to the time of her death, about the year 1860 ;

15. Defendant has continued in possession of the premises ever since ;

16. The deed from Peter Robertson, dated 15th December, 1868, to defendant and A. R. LaRush, is admitted ;

17. The marriage of Andrewlina Dixon Armour, under age, with John Armour, her husband, under 21 years of age, was admitted, and the deed from her and her husband to the plaintiff Scott, executed in 1867, as required by law, was also admitted.

The widow of Andrew Robertson, who had since remarried, was called, who stated that she left the lot in question about three months after her husband's death, and went to Scotland. She said she gave possession of the lot, to look after it, to Adam Lock, Squire Kerr, and James Robertson. They were to look after it for her. After living in Scotland thirteen years, she returned to this country. She said she gave no authority to Peter to take possession of the land ; that he wrote for a line for possession ; she sent one, but it was destroyed by the post-office authorities, and he never got it. He wrote for another, and she would not send it. Two letters were produced from William Robertson, and one purporting to be from Peter Robertson, dated 1843. The letters were addressed to a Mr. Brooks, writer, in Kelso, requesting him to write to Mrs. Andrew Robertson, and tell her to send the good-will of her estate to him ; he would be much obliged if he would get it and send it to him, and if he did not get it he would be sure and keep back the money for the children until he got it, for he could not get the deed of his land till he got it. The letter of William Robertson, dated 19th November, 1843, requested the party addressed to persuade Mrs. Robertson to send her claim to the land, which he presses for the interest of her family, and speaks of Mr. Bailey selling the land unless the matter is arranged, and that Peter will have his money back.

There was evidence of defendant offering to purchase

the interest of the parties, but this was after litigation had been commenced on the subject.

Peter Robertson gave a plain statement of the matter. He said he came out in 1840 to settle on the lot, for his father, and by his direction. He went on the lot on the understanding he should own it; he took possession. Dr. Bailey, who gave the bond for the deed to Andrew, knew he was in possession of the lot. He went to see him about an instalment his father was to send. Dr. Bailey said it was due, and if not paid within three weeks he would sell the land again. Peter got the money out of the bank, and paid the amount that Dr. Bailey demanded. Peter then drew a deed from Bailey; the latter said he would consult some one in Colborne. They went to Colborne, and, on the advice he received there, the doctor declined to give the deed. Peter remained in possession, got the line run between the two halves of the lot, about four years after he came out, and continued to occupy the place until about fifteen years ago, when, as the place was too small for them all, he asked his mother to take the place, and he would buy another. The mother paid him £200 for his right; he left the place, and she remained there until her death, and devised the property to her daughter Christina, who continued to occupy until her marriage and up to the time of her death, and her husband, the defendant, occupied ever since June, 1840. Peter said the place had been occupied continuously by himself, his mother, Christina, and defendant, up to the time of the trial. When he first went there there were  $3\frac{1}{2}$  acres cleared; as they chopped it was cleared and fenced. He chopped and cleared every winter. There was now over 60 acres cleared, nearly all cleared before he left the place, except two acres. Peter had the bond for the deed with him when he paid Dr. Bailey. Peter's father died in Montreal on his way here. Isabella came with her grandmother to the place, about two years after Peter came there, and resided there, off and on, until the grandmother's death, making the place her home.

Alick Moore, the occupant of the other half of the lot, had lived there 29 years. He said Peter took possession of the half lot in dispute in the same year; he held possession about 12 years. The lines were run about 24 years ago. Peter's mother occupied from the time he left until her death; then Christina, until she died, and defendant since. Isabella came with her grandmother, and lived on the place until a little after her aunt Christina's death. Her grandmother brought her up.

A verdict was entered for the defendant, with leave to the plaintiffs to move to enter it for them if the Court should think, under the evidence, the plaintiffs were entitled to recover.

In Michaelmas Term last, *Hector Cameron* obtained a rule *nisi*, pursuant to leave reserved, to set aside the verdict for the defendant and enter it for the plaintiffs, on the ground that by the law and evidence the plaintiffs were entitled to recover, and that no adverse possession sufficient to bar the plaintiffs' right was proved on the part of the defendant, and those under whom he claimed. The rule was enlarged over until this term, when

*J. A. Boyd* shewed cause. The land being patented, and the patentee being aware that Peter was in possession in 1840, the statute began to run then, and the title of the patentee and those claiming under him became extinct in 1860, and this action was commenced in 1869. This Court can only deal with the legal title, and that is so clearly extinguished that there seems no ground for argument. At all events, the plaintiffs here shew no right except through the heir-at-law of the patentee, whose right was extinguished.

If defendant were himself bringing ejectment, he could maintain it against any of these parties, except, perhaps, the owner of the estate of the original patentee; for the possession being for so long a period in the mother of Christina Robertson, she had a devisable estate, and could pass it by will, and that would give a good title against

any subsequent disseisor : *Keeffe v. Kirby*, 6 Ir. C. L. Rep. 591; *Asher v. Whitlock*, L. R. 1 Q. B. 1; *Dixon v. Gayfere*, 17 Beav. 421; *Darby on Limitations*, 391, 397.

*Hector Cameron*, contra. The possession, to exclude relatives who may inherit, should be of an undisputed character : *Hemmingway v. Hemmingway*, 11 U. C. R. 237; *McArthur v. McArthur*, 14 U. C. R. 544; *Foster v. Emerson*, 5 Grant 135. Peter Robertson took possession under the widow of Andrew and must be considered as holding for Andrew's heirs-at-law, who were infants. Isabella, being one of those heirs, was always in possession after her grandmother came to the place, and there could be no possession as against her. The grandmother herself was not in possession; it was Isabella : *Darby on Limitations*, 183. Then the evidence given at the trial shews that defendant offered to purchase the claim of plaintiffs : *Penlington v. Brownlee*, 28 U. C. R. 189.

RICHARDS, C. J., delivered the judgment of the Court.

We think this rule must be discharged.

The facts appear to me to be pretty well established by the evidence, and the law applicable to the case seems not at all doubtful.

Andrew Robertson bargained for the land with the owner in fee, in September, 1837, for £87 10s., payable £43 15s. on the execution of the bond for the deed, and the remaining sum in two instalments, with interest, the first payable 25th December, 1839, and the second on the 25th December, 1841. The payment of the first instalment seems admitted by the bond. The condition of the bond, dated 8th September, 1837, is, that Dr. Bailey, the obligor, will convey the land to Andrew Robertson, in fee, when the purchase money is paid according to the bond, and the terms of the notes given for the instalments bearing even date with the bond. Nothing is said in the bond about the possession of the land in the meantime.

The evidence and admissions shew that Andrew Robertson took possession of the land in the fall of 1837, and

made some small improvements, and died in possession in 1839. His widow then went to Scotland. The place does not appear to have been occupied until Peter Robertson came out, in 1840, to this country, and took possession. When there was no one in possession, Dr. Bailey, the owner of the legal estate, was in presumption of law in possession. Peter took possession in 1840, with the knowledge of Bailey, the legal owner, and kept possession, probably with the knowledge of Bailey, paying him the balance of the purchase money due him. He cultivated the land as his own, cleared 50 or 60 acres, and then sold his interest to his mother, and received £200 for it. The mother remained in possession until her death, and devised it to her daughter, defendant's wife. She remained in possession till her death, leaving a son surviving, and defendant holds as tenant by the curtesy.

First, then, as to the right of the patentee of the Crown and those claiming under that title. He was clearly out of possession, no payment of rent, or any acknowledgment in writing, to prevent the statute barring that claim. The plaintiffs' claim through the conveyance from his heir-at-law cannot be sustained.

Then how does the claim arise by virtue of the right of the ancestor of the two females, daughters of Andrew? Andrew never had the legal estate, and therefore that was never cast on them. Their mother, in her evidence, spoke of Peter receiving possession from, and holding title under her. If Peter and those who claim under him are estopped from denying the right of Andrew's widow, it is sufficient to say that she is not a party to this suit, and has never conveyed her interest to any one, as far as the evidence given on this trial shews. Under the evidence, however, it seems more than doubtful if Peter really ever entered under her.

We see no privity whatever between Peter and the heirs of Andrew by which he recognized their rights, either equitable or legal, to the property.

As already remarked, the legal estate was in Dr. Bailey

when Peter entered, and as against that estate the defendant has established a right to maintain his possession. If the heirs of Andrew have any peculiarly equitable claims, they must enforce them in another court. We can only recognize the legal rights of parties in proceedings like these.

The offer by defendant to purchase, referred to by Mr. Cameron, would only be evidence to go to a jury where a defendant really had no title, or pretence of title; it could never defeat a good title.

*Rule discharged.*

## MCDONALD V. CLARKE.

### *Mortgage—Construction—Description of parties.*

In a mortgage for \$103, purporting to be made in pursuance of the Act respecting Short Forms of Mortgages, between A. and B., described only as the parties of the first and second parts, the grant of the land was by "the said mortgagor unto the said mortgagee," and the parties were afterwards described throughout as "mortgagor" and "mortgagee," the covenant for payment being, "the said mortgagor covenants with the said mortgagee that the mortgagor will pay," &c. In the margin was this receipt: "Received, on the date hereof, from the said mortgagee, the sum of \$103, being the full consideration money herein mentioned," signed by the party of the first part. The mortgage was executed by A. only. It was objected, in an action against A. on the covenant to pay, that there was nothing in the deed to shew who was covenantor and who covenantee; but

*Held*, that by referring in the receipt for the date and sum received to the mortgage, the defendant had made the receipt part of the mortgage, and it clearly shewed him to be the mortgagor; or, if this were not so, that the possession of the deed by the plaintiff, delivered to him by defendant, and the acknowledgment in the receipt, shewed the plaintiff to be the mortgagee.

An admission of the execution of the mortgage was held clearly to include the signature to the receipt, and the receipt of the money as there stated.

DECLARATION, that defendant, by deed, dated 21st May, 1868, covenanted with the plaintiff to pay him \$103, with interest at the rate of nine per cent., but did not pay the same.

Plea, *Non est factum.*

The case was tried at the last Spring Assizes at Cornwall.

The plaintiff gave in evidence an instrument commencing, "This indenture made (in duplicate) the twenty-first day of May, 1868, in pursuance of the Act respecting Short Forms of Mortgages, between William Clarke, of, &c., of the first part, and John Sandfield McDonald, of, &c., of the second part, witnesseth, that in consideration of \$103 of lawful money of Canada, now paid by the said mortgagee to the said mortgagor (the receipt whereof is hereby acknowledged), the said mortgagor doth grant and mortgage unto the said mortgagee, his heirs and assigns forever," a certain town lot in the said town of Cornwall. Then followed the usual proviso that the mortgage should be void on payment of \$103 in one year from date, with interest at the rate aforesaid, payable half-yearly. Then, "the said mortgagor covenants with the said mortgagee, that the mortgagor will pay the mortgage money, and interest, and observe the above proviso." Then followed the other usual covenants as to title, right to convey, &c., the covenants being by "the mortgagor" and to "the mortgagee;" and the mortgage concluded, "Provided that, until default of payment, the mortgagor shall have quiet possession of the said lands. In witness whereof, the said parties have hereunto set their hands and seals." Then followed the signature "William Clark," opposite a seal, attested by a subscribing witness. In the margin, on the same side of the sheet as the signature, seal, &c., the following was written: "Received, on the date hereof, from the said mortgagee, the sum of one hundred and three dollars, being the full consideration money herein mentioned." (Signed) William Clark, in presence of the same subscribing witness as the witness to the mortgage.

The execution of the mortgage was admitted.

Defendant's counsel objected that it was not shewn by the deed who was covenantor or who was covenantee. The learned Judge overruled the objection, reserving leave to the defendant to move, and a verdict was entered for the plaintiff for \$122.43.

*Bethune* obtained a rule *nisi* to enter a nonsuit, pursuant to leave reserved at the trial, on the ground that the deed given in evidence by the plaintiff at the trial was void, because it did not shew who was covenantor and who was covenantee.

*S. Richards*, Q.C., shewed cause. The form of mortgage used is that prescribed by Statute 27-28 Vic., ch. 31, where the parties are described as mortgagor and mortgagee. It is true the plaintiff is not named as mortgagee, nor the defendant as mortgagor. The party making the grant is usually the party of the first part, and so the defendant is described in this deed. He is the only party executing it, and it is produced by the plaintiff. These are circumstances to shew who is meant by mortgagor and mortgagee; and the receipt on the face of the deed acknowledges the receipt of the mortgage money by the defendant, and that is also acknowledged in the body of the deed by the mortgagor. These circumstances together are sufficient to shew who is the mortgagor and who the mortgagee. If it were uncertain who was mortgagor and who mortgagee, the deed would be void, and the Court will always struggle to avoid such a result. The authorities all shew a leaning on the part of the Courts to carry out what is undoubtedly the intention of the parties, when that can be shewn, as it clearly is in this case, without interfering with any settled principle of law: *Shep. Touch.* 53. Where, in the clause of grant, the name of the grantor was omitted, the Court supplied it by construction: 2 *Prest. Con.* 380. But though there be two persons of the same name, the deed will not be void on that account for uncertainty; but under the rule *id certum est quod certum reddi potest*, the certainty of the person may be averred and proved. In *Lord Say and Seal's Case*, 10 Mod. 47, S. C. Br. Parl. Cas. 73, where the name of the bargainor was omitted in the operative part of a bargain and sale, it was supplied, because it appeared from the deed what was the intention. In *Dent v. Clayton*, 10 L. T. Rep. N. S. 866; S. C. 10 Jur. 671, the wife of a bankrupt was a party

named in the deed of land conveyed by the assignees, and evidently it was intended she should release her dower, but the words of the deed did not expressly state this. The Vice-Chancellor held it a valid release of the dower. He referred to *Lord Say and Seal's Case*, and *Spyve v. Topham*, 3 East 115, and stated, "If the wife's name be not imported into the operative part, you would have a deed conveying nothing on her part, yet to which she was a party. But for the intention on her part to give up her right to dower, there could have been no reason for her being a party." This defendant signs a deed produced by the plaintiff, which the plaintiff himself does not sign, and signs a receipt acknowledging the receipt of the mortgage money. That is surely sufficient evidence that he is the mortgagor.

*Kerr*, contra. The form given in the statute directs the insertion of the names of the parties, and the recitals, if any. The proper course would have been to state in the recital, after the description of each party named, the mortgagor or mortgagee in this deed mentioned. The words mortgagor and mortgagee in this deed are mentioned in such a manner that it cannot be discovered by what is contained within the four corners of the deed which of the parties is mortgagor and which is mortgagee, and in this respect it is uncertain and void. In *Bustard v Coulter*, Cro. Eliz. 903, 904, where, in the premises, the name of the purchaser was not stated, though it was in the *habendum*, it was held the deed was void. This case seems, however, overruled in *Spyve v. Topham*, 3 East 115. The receipt is no part of the deed, and was not proved on the trial. In *Muckleston v. Smith*, 17 C. P. 401, it was held that a memorandum attached to a lease of lands formed no part of the lease, though the lessor agreed to allow the lessee the use of the personal property mentioned in the memorandum, to assist him to pay the rent and maintain his family. *Reeves et al. v. Watts*, L. R. 1 Q. B. 412, is a late case as to parties named in a deed.

RICHARDS, C. J., delivered the judgment of the Court.

The settled doctrine of the law applicable to the construction of deeds, and in fact all written instruments, is, that you should struggle to give the force and effect to them which the parties executing them intended.

Now this defendant executed this deed. He is the only party named in the deed who signed it. The plaintiff is the other party to the deed, and, although he has not signed it, he is in possession of it, and produces it at the trial. If the plaintiff is the mortgagee, he is entitled to the possession of it; if not, he is not. The defendant must be either mortgagor or mortgagee, for in that way only can he be a party to the deed. There is no dispute that the party granting in this deed is the mortgagor. There is no doubt he received the money mentioned in the deed, and it is to be presumed he owned the property mortgaged in it.

The doctrine that averments shall not be received to contradict deeds, and that no averment founded on parol evidence which tends to contradict or vary a written agreement is in general admissible, seems to be well settled. The decided cases, however, shew that parol evidence of collateral facts not contradicting the deed, but tending to support it, may be given.

Thus, to support a bargain and sale, evidence of a pecuniary consideration may be given: 1 Rep. 176*a*, and cases there referred to. "It is not considered inconsistent with a deed to prove another consideration in addition to that expressed." *Ib.* note *d*.

In *Rex v. Inhabitants of Scammonden*, 3 T. R. 474, a larger consideration than that expressed in the deed was allowed to be proven. In *Rex v. Inhabitants of Laindon*, 8 T. R. 379, it was allowed to be shewn that money was paid as an apprentice fee, though no mention was made of it in the contract of apprenticeship. In *Reeves et al. v. Watts*, L. R. 1 Q. B. 412, cited on the argument, the deed was between the defendant of the first part, and all the creditors of the said A. W. of the second part. It

recited that it was made under the provisions of the Bankrupt Act, to operate equally for the benefit of, and to bind all the creditors, whether they assented to it or not, and witnessed that defendant covenanted with said several persons, parties thereto of the second part respectively, that he would pay unto the said several persons, parties thereto of the second part, being all and every the present creditors of the bankrupt, a composition. It was contended that the plaintiff was not bound by this release under the statute, as he was not a party to the deed, and could not enforce it against the defendant. The answer was, he was one of the creditors, and all the creditors were parties, therefore he was a party; and the Court so held. There it would be necessary to give parol evidence to shew he was a creditor before he could avail himself of the deed.

In that case Blackburn, J., thought the maxim *certum est quod certum reddi potest* applied, and referred to *Maughan v. Sharpe*, 34 L. J. C. P. 19, where an assignment of goods by indenture was between W. D. of the one part and the City Investment and Advance Company of the other part, and Mr. Justice Williams said the meaning was, that the deed was to convey the goods to the persons using the style and name of the City Investment and Advance Company. "They may or may not be a corporation; *but when it has been ascertained* that the persons answering to that description are the defendants, the grant operates accordingly to convey the property to them."

In both these cases it was necessary to resort to parol evidence to ascertain who the grantees were.

The language of the receipt which is written on the margin of the deed is peculiar. I will copy it:—

"Received, on the date *hereof*, from the said mortgagee, the sum of one hundred and three dollars, being the full consideration herein mentioned.

"(Signed) WILLIAM CLARKE."

Witness, same as witness to the deed.

It will be observed there is no date to the receipt, nor apparently, from the way it is drawn up, was any date, as

a separate and independent one, intended to be put to it. Then it is stated to be the full consideration *herein* mentioned. There is no consideration mentioned except in the mortgage, and that is \$103, as in the receipt. We think the defendant has in effect made, by relation, the receipt a part of his deed, and that clearly shews he is the mortgagor.

If that view is thought to go too far, we think the authorities go far enough to shew that the possession of the instrument itself by the plaintiff, delivered to him by the defendant, and the acknowledgment under the hand of the defendant contained in the receipt in the form there used, with the other facts, are sufficient to shew that the plaintiff is the mortgagee intended in and by the deed.

It is urged the signature of defendant to the receipt is not proven. That was not urged at the trial, and we assume that it is not seriously intended to dispute it. We take it for granted the admission was intended to avoid the necessity and expense of calling the subscribing witness, and the effect of that admission is, that the defendant signed the deed and receipt, and received the mortgage money from the plaintiff on the day of the date of the deed.

We think, according to some of the cases, the fact might be shewn that the defendant was the owner of and lived on the land which was granted and mortgaged by this deed, and that that fact might be given in evidence in order to interpret the mortgage.

On the whole, we think the defendant's rule must be discharged with costs.

See *Cru. Dig.*, Title 32, ch. 20, "Construction of Deeds."

*Rule discharged.*

## IN RE HARBOTTLE AND WILSON.

*Coroner's inquest—Medical witnesses—Fees of.*

Where a coroner, under C. S. U. C. ch. 125, summoned a second medical practitioner as a witness at an inquest, and to perform a *post mortem* examination, but it was not shewn that such practitioner had been named in writing and his attendance required by a majority of the jurymen, as provided for by sec. 9, a *mandamus* to the coroner, to make his order on the county treasurer for the fees of such witness, under sec. 10, was refused.

*Semble*, that on an application for such *mandamus*, the county treasurer as well as the coroner must be called upon.

IN Michaelmas Term last, *Robinson*, Q.C., obtained a rule *nisi* calling on George Wilson, a coroner of the county of Brant, to shew cause why a peremptory writ of *mandamus* should not issue, commanding him to make his order on the treasurer of the said county in favor of Robert Harbottle, for the payment of \$10, fees due to the said Harbottle being a qualified medical practitioner, for attendance as a witness upon an inquest held by said coroner, &c., and for the performance of a *post mortem* examination, &c., on or about the 29th of May last, in obedience to the order of the said coroner, issued and served upon the said Harbottle, for such attendance and the performance of such examination, and why the said coroner should not pay the costs of the application.

The application was based on the affidavit of the applicant, who swore that the coroner did, on or about the 29th day of May, 1869, cause him to be served with the order annexed to his affidavit, signed by the coroner: that on or about the said 29th May, at the request of the coroner, he attended and made a *post mortem* examination of the deceased, and reported and gave evidence before the coroner and jury on the 31st May: that he requested the coroner several times since the inquest to give him an order for \$10, being his fees, on the treasurer of the county: that the coroner refused to give him such order: that he was a duly qualified practitioner, &c., and had not received any order for his fees, or any part thereof.

The order attached to the affidavit bore no date, and was as follows :

*"Coroner's Inquest at Mount Vernon, upon the body of Ida Derry.*

"By virtue of this order, as coroner for the county of Brant, you are required to appear before me and the jury, at Mount Vernon, on the 29th day of May, 1869, at five o'clock, P.M., to give evidence touching the cause of death of Ida Derry, and make a *post mortem* examination of the body, and report thereon at the said inquest.

"(Signed) GEORGE WILSON,

"To Dr. Aikman.

Coroner.

"To Dr. Harbottle."

The applicant also filed the affidavit of one Joseph Gilmour, who swore that he was present on or about the 29th June, 1869, and heard Harbottle request the coroner to give him an order on the treasurer for his fee: that the coroner promised to give the order if he, Harbottle, would call in an hour and a-half: that they accordingly called, and that the coroner did not give the order. He also swore that the coroner admitted that he did not examine on oath Dr. Aikman, referred to in the order to attend, as to whether he was a registered practitioner, and that Harbottle represented that Dr. Aikman was not then registered. Also two other affidavits of persons, who swore that on or about the 2nd July, 1869, they heard Harbottle request the coroner to give him the order, and that he refused to do so.

During this term, A. S. Hardy, for the coroner, shewed cause, and filed a number of affidavits. The coroner swore that, finding that the deceased had not been attended during her illness and at her death by any duly qualified practitioner, he directed that a *post mortem* examination should be made by a Dr. Aikman, a physician and surgeon, to the best of his knowledge and information a legally qualified medical practitioner, practising his profession in the township, &c., and caused a summons under the statute to be issued to him: that Dr. Aikman duly made the *post mortem*

examination, and that the same was not made by the applicant: that while the same was being made, or immediately before, Harbottle, through the constable in charge, requested permission to be present, as he understood, merely as a spectator: that he consented; and that Harbottle rendered no professional services at the inquest, to his knowledge or by his order or direction: that after the *post mortem* examination Harbottle applied to said constable to be summoned as a witness on the adjourned inquest, and that he added his name to the summons already issued to Dr. Aikman, and told the constable that he might be present to testify: that Harbottle also applied to him, the coroner, personally, stating that he wished to give evidence at the adjourned inquest: that he did not understand or suppose that he would require or expect compensation for so doing, or for being present at the *post mortem* examination, and that his applications were not made with that view, but for the purpose of observation, and of bringing him before the public, he being a young practitioner; and he swore that he would not have consented to his being present at the inquest on any other supposition: that after the examination of Dr. Aikman, he asked the jury whether they, or a majority of them, desired further medical testimony: that the jury unanimously refused to direct or to request that another medical practitioner should be summoned: that as Harbottle was anxious to be called, he told him he might give his evidence, which he did, but that it was done not at the request of the jury, and solely in compliance with his, Harbottle's, former request to be permitted to do so. He swore that he gave Dr. Aikman the order for his fee of \$10 immediately after the inquest, and before any proceedings herein, which Harbottle well knew, and that he was advised and believed that he had no lawful authority to give more than one order without the request of the jury. He denied, as stated by Joseph Gilmour in his affidavit, that he promised to give an order to Harbottle, but stated that he said he was willing to do so if he could shew he was lawfully entitled to it.

The constable in charge corroborated the affidavit of the coroner as to the circumstances under which the applicant attended the inquest, and stated that he had not been summoned at the time of the *post mortem* examination : that after that he requested the constable to subpoena him to give evidence before the jury : that he told the coroner of his request, and so the applicant's name was added to the order that had been served on Dr. Aikman, and that the jury refused to hear further evidence after hearing Dr. Aikman.

Dr. Aikman also swore that Harbottle rendered no professional and scarcely any other assistance at the *post mortem* examination, and what he did do was at his request, and could have been done by any one : that Harbottle expressed himself to the effect that he wanted to be present at the examination with a view to his own information ; and that he, Aikman, obtained his order for \$10 on the day after the inquest.

Other affidavits were filed, and in reply the applicant filed a number of affidavits in support of his application, made by jurors and others. It is not necessary that they should be set out for the purposes of the judgment, as the material facts upon which the decision of the Court turns appear in the affidavits already referred to.

*Robinson*, Q.C., supported the rule, citing Consol. Stat. U. C., ch. 125 ; *In re Askin and Charteris*, 13 U. C. R. 498 ; *In re Fergus and Cooley*, 18 U. C. R. 341.

MORRISON, J., delivered the judgment of the Court.

Under sec. 8 of ch. 125, Consol. Stat. U. C., if the coroner finds that the deceased was not attended at his or her last illness or death by any legally qualified medical practitioner, the coroner may issue his order, according to a form in the Act, for the attendance of any such practitioner in actual practice near the place where the death happened, and may direct a *post mortem* examination by the medical witness so summoned. And by the 9th section, whenever it appears to the majority of the jury at the inquest that the cause of

death has not been satisfactorily explained by the evidence of the medical practitioner, &c., such majority may name to the coroner in writing any other practitioner or practitioners, and require the coroner to issue his order, in the form set out, for the attendance of such last-mentioned practitioner or practitioners, and for a *post mortem* examination, &c.; and the coroner is subject to a penalty if he refuses. And by the 10th section, when any such practitioner has attended in obedience to any such order as aforesaid, he shall receive for such attendance, if without a *post mortem* examination, \$5, if with, \$10, &c.; and the coroner shall make his order on the treasurer of the county in which the inquest is holden in favor of such practitioner, for the payment of such fees, and such treasurer shall pay the sum mentioned in such order to such medical witness, &c.

The existence of a legal right or obligation is the foundation of a writ of *mandamus*, and the applicant here must make out that there is a legal obligation on the coroner to make the order he demands. Now the alleged obligation or right arises under the statute, and in order to make the rule absolute, we must be satisfied, first, that the coroner had authority and was bound to make the order required by the applicant, an order the payment of which we could hereafter enforce if resisted by the county treasurer; and in this latter respect, what was suggested by my brother Wilson during the argument seems to have great force, namely, that the county treasurer should have had notice of this rule; for even if we granted this application it might turn out eventually to be fruitless, for we take it that the county treasurer might nevertheless resist payment of it successfully if he could shew that it ought not to have been made. Assume, for argument, the case of collusion between a medical witness and the coroner, or the coroner taking upon himself to summon half a dozen practitioners, and making such order to each of them. The public, in such a case, would be grossly defrauded if the county treasurer could not resist the payment of orders

made under such circumstances; so that upon the ground of want of notice to the county treasurer alone, I am inclined to hold that the application ought not to be granted. However, irrespective of that objection, the writ cannot be granted.

It is quite apparent that the intention of the Legislature, with a view of protecting the public against unnecessary charges at inquests, was to restrict the coroner to the summoning of only one medical witness for the purpose of giving testimony as to the cause of death, and, if necessary, to make a *post mortem* examination, for which services certain fees were limited, and that no other medical witness should be summoned so as to entitle him to those fees unless a majority of the jury, under the circumstances mentioned in the 9th section, *named in writing* one or more other practitioners, and *required* the coroner to summon them to give testimony, &c. In that case it was the duty of the coroner to summon the so-named practitioner or practitioners, the statute providing that the practitioner summoned by the coroner himself, and the other or others named by, and summoned at the request of the jury, should be entitled to the fees fixed by the Act.

Now it is quite clear, first, that the coroner did originally summon one medical gentleman, Dr. Aikman, under the 8th section, and that that gentleman, in pursuance of the coroner's order, attended and made a *post mortem* examination, and afterwards gave testimony before the jury, and it also appears that he was summoned previous to any attendance of Dr. Harbottle, and for the payment of the fees for such examination by Dr. Aikman the coroner made his order, the day following the inquest, on the county treasurer. Such being the case, the coroner had no authority to summon the applicant, or any other person, and to make an order under the statute to entitle him to fees, unless the applicant can shew that a majority of the jury named him to the coroner in writing and required his testimony, under the provisions of section 9—the naming in writing by the jury being intended no doubt as a check

on the coroner, as well as an authority and voucher to justify the making the additional order or orders on the county treasurer.

It is not shewn or pretended that to the majority of the jury in question the cause of death was not satisfactorily explained, or that the jury named the applicant in writing, or requested his evidence. We therefore fail to see any ground upon which we can command the coroner to make the order in question.

On the argument, Mr. Robinson partly pressed the case on the ground that as his client received an order to attend, and being bound to observe it, he was entitled to the fees allowed. If he has any remedy, it is not by an application of this nature. Assume it to be admitted that the coroner, after he had summoned Dr. Aikman under the statute, and obtained his services, ordered the attendance of the applicant, that fact alone is unimportant, and makes no difference so far as this application is concerned, because the coroner did that which he was not authorized to do, and his doing so is no reason why we should saddle the public with a charge not within the statute. We would never command the doing of an act where the conditions precedent required by the statute to that act being done are wanting.

It is unnecessary to refer to the numerous affidavits filed, except to notice that the coroner swears positively that he never intended to have the applicant in attendance at the inquest as a medical witness, or to make a *post mortem* examination, but the presence of the applicant was solely at his own request, and that the insertion of his name in the summons to Dr. Aikman was also done at his suggestion, and after the *post mortem* examination.

We think the rule should be discharged with costs. It is much to be regretted that for so trifling a matter so much expense should have been incurred, but from the affidavits filed I fear it is the result of professional and personal feeling, which is too frequently seen in matters where medical gentlemen are engaged.

*Rule discharged, with costs.*

## HAGARTY V. BRITTON.

*Survey—Change of plan—Inconsistent descriptions—Admissibility of descriptions to explain patents.*

One R. in 1829 first surveyed part of the Township of Plympton fronting on Lake Huron, and his plan returned shewed the lots fronting on the lake with an oblique line in rear, following the general course of the lake, but no allowance for road. Afterwards a plan of the whole township was compiled in the Crown Land Office, from surveys of three separate portions of it made by different surveyors. The descriptions of the lots were made from this plan, all the lots having been granted after it had been completed, and the distances in the descriptions contained in the deeds were according to the scale on which the plan was compiled. This plan shewed a road in rear of the front lots, and made their depth greater than in R.'s plan. There was no proof of any work on the ground shewing that R. had ever run out or posted the rear line as it appeared on his plan.

*Held*, that it was competent for the government to make such allowance for road, not being inconsistent with any work on the ground.

*Held*, also, that in order to give effect to the change made by such allowance—to avoid an irregular rear boundary for such front lots—and to reconcile the plans, and the grants for one of the front lots and two gore lots in rear of it, which could not all three be carried out owing to a deficiency in the land—a proportionate reduction should be made in each of such lots.

The description of a lot by metes and bounds, from the Crown Land Department, is admissible in evidence to explain the patent for the lot, in which it is described only by the number and concession.

TRESPASS for breaking and entering the east half of lot 20, in the front concession upon Lake Huron, in the township of Plympton, and depasturing the same, and cutting down trees, and throwing down the fences of the plaintiff.

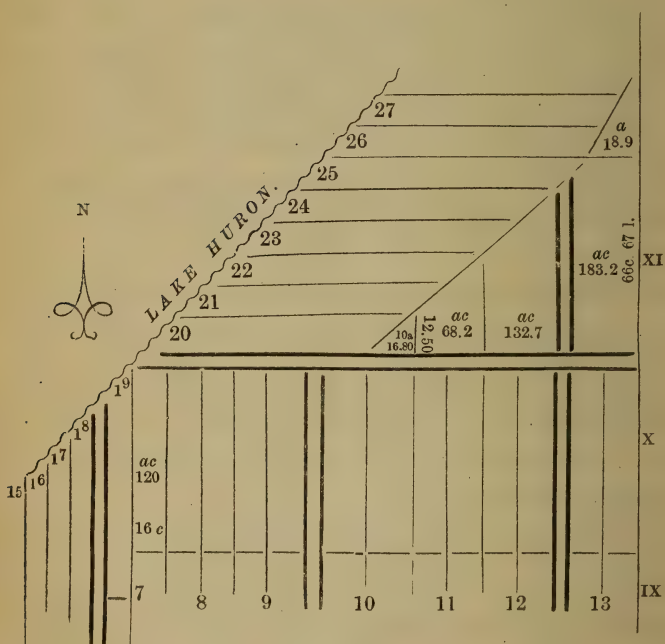
Defendant pleaded, 1, not guilty; 2, that the said close was not the plaintiff's, as alleged, but was the freehold of him, the defendant. Issue.

The cause was tried before the late Mr. Justice John Wilson, at the Spring Assizes in 1869, at Sarnia, and a verdict was taken by consent for the plaintiff, damages \$10, subject to the opinion of the Court, who were at liberty to draw inferences of fact as a jury, and to order a verdict for the defendant.

The part of the township of Plympton where this dispute arose was surveyed in the year 1829 by Charles Rankin, Esq., Deputy Provincial Surveyor. He was instructed to lay

out the lots 30 chains in width, posting each way 50 links from the centre of the road, with an allowance for a road of one chain between every third and fourth lot, opening and marking the same in a good and efficient manner. He was directed to open the base lines in a good and sufficient manner, posting and marking the lots with a marking iron at their respective angles, as represented on the diagram sent him; *i.e.*, lots 66 chains and 67 links by 30 chains, containing 200 acres, butting on each other at the divisional line or limit, and forming their fronts on the concession road.

The annexed sketch, which is a copy of part of Mr. Rankin's plan, will serve to shew the position of the land in question:—



With respect to the lots bordering on the lake shore, they were to be posted on the bank, with an allowance for road in front along the bank. He was instructed to do that by sub-dividing the distance between the proof lines, excepting the intermediate side roads, into eighteen equal parts, and those between the concessions into twelve equal parts, regulating their depth according to the front, giving to each lot 100 acres.

The width of the lots on the lake shore perpendicular was 11 chains and 11 links; a little less than 91 chains would make 100 acres. By the original field notes, starting from the post on the lake shore planted between lots 19 and 20, he ran north  $58^{\circ}$  east 20 chains 94 links, for lot 20, and planted a post between 20 and 21, (21 marked as a reserve); then 20 chains 94 links, on the same course, for 21, and planted a post one chain from the bank marked 21 and 22. The field notes as to his survey of the eleventh concession were also read from the allowance for road between 12 and 13. From that point he ran west 30 chains, planted 3 posts marked 12 and 11; then going on, gives no distance, but says planted 3 posts, marked 11 and 10 on south one; then west over same kind of land, at 30 chains planted 3 posts, numbered and marked 10 and R. for side and R. for concession road on south one, and R. for road on south face of north one, at 30 chains and 50 links a picket, at 31 chains 3 posts, R's. for roads, and No. 9 on south one, and R. for road on south face of the north one; then west over same land, 30 chains, planted 3 posts; then west 30 chains, planted 3 posts; then 18 chains, to the lake.

The plan which he returned to the Crown Lands Department shewed that No. 12 in the 11th concession contained 132.7 acres, No. 11 in the 11th, 68.2 acres, No. 10, 10 acres. That portion of No. 10 adjacent to the concession road between the 10th and 11th concessions was marked 16.80, and the division line between 10 and 11 in the 11th concession was marked as 12.50 deep. All the rest of the lots on that portion of the plan given in evidence shewed the lots intended to be 200 acre lots apparently

divided in the centre parallel with the side lines of the lots, or 100 acre lots, on the lake shore, except lot No. 7 in the 10th concession, which was 16 chains wide, and marked as containing 120 acres; lot No. 13 in the 11th concession, marked 183.2, acres; and a small gore in the 12th concession in rear of lots 26, 27 and part of 28 on the lake shore, which gore was marked 18.9 acres.

Rankin's plan of survey shewed a straight line from the south-east corner of 20, lake front, and the concession line between the 10th and 11th concessions, on a course apparently parallel with the general course of the lake to the north-east corner of lot 25 in the lake front lots.

In the office plan, 22, of the township of Plympton, the course of this line was mentioned as north 54° east, and shewn as a road allowance.

The plan returned by Rankin shewed the perpendicular width of the lots on the lake shore was 11 chains and 11 links, and a little less than 91 chains would make the 100 acres.

There was no note in the return of any line having been run in the rear of the lake shore lots; his instructions did not require it; nor was there any reference to a road allowance in the rear of those lots, nor was such allowance shewn by any original surveyor's plan or field notes of the survey.

The office plan was compiled from the surveys of three different parts made by separate surveyors. One part only of the township was surveyed by Rankin. The office plan was larger than Rankin's. The office plan shewed the depth of No. 20 103 chains, Rankin's shewed it 91 chains. All the descriptions of the land were made from the office plan.

Broken lot No. 11 in the 11th concession was one of the first granted. The patent was dated 20th December, 1836, and granted to Arthur Bowen, of the City of Toronto, &c., all that parcel or tract of land situate in the township of Plympton, containing 268 acres, more or less, being composed of lots 50 and 51 fronting on Lake Huron, containing 200 acres, and broken lot number 11 in the eleventh concession of said township of Plympton, containing 68 acres.

Defendant's title to the land under this grant, through mesne conveyances, was admitted.

Defendant offered in evidence the extended description of the broken lot as prepared in the Surveyor General's office, and sent to the Secretary's office, but which was not incorporated in the deed. The reception of this document as evidence of the description was objected to. The learned Judge, however, admitted it subject to the objection.

The description was as follows:—"Broken Lot Number 11 in the 11th concession, (Plympton), that is to say, commencing where a post has been planted at the south-west angle of the said lot; then north 10 chains, more or less, to the allowance for road in rear of the lots fronting on Lake Huron; then north 54 degrees east, 36 chains, more or less, to the limit between lots numbers 11 and 12; then south 32 chains, more or less, to the allowance for road between the 10th and 11th concessions; then west 30 chains, more or less, to the place of beginning, containing 68 acres, more or less."

On the 9th of March, 1839, a Government patent issued granting to George Hyde 442 acres of land, more or less, in Plympton, being composed of lots 20 and 21 in the front concession upon Lake Huron, containing 200 acres; lot 19 in the front concession; the east part of lot 7, and the south part of the west half of lot 8, in the 10th concession, containing 242 acres, "Commencing, first, in front upon Lake Huron, in the limit between lots 21 and 22; then east 103 chains, more or less, to the allowance for road in the rear of the said lots; then south 54° west 36 chains, more or less, to the allowance for road between the 10th and 11th concessions; then west 103 chains, more or less, to Lake Huron; then north-easterly along the water's edge to the place of beginning, containing 200 acres. Reserving free access to the bank for all vessels, boats, and persons with one chain for a road on the top of the bank."

Some 22 or 23 years ago, the plaintiff owning the east half of 20 on Lake Huron, and one Symington owning,

Gore lot 11, the former employed Mr. Salter, a Provincial Land Surveyor, to run out his lot. He began at the stake on the shore of Lake Huron, at the end of the 10th and 11th concession line, on the north side of the road between the 10th and 11th concessions, and the east side of the road allowance along the shore of Lake Huron. He chained along eastward, and planted a stake at the south-east angle of 20. He chained along the oblique line, and planted a stake; then chained westward to the lake where the post was standing or had stood. He divided lot 20 on the concession, and put a stake there. The line now claimed by defendant was west of the point at which Salter planted the post to indicate the south-east angle of 20.

Symington and the plaintiff both assumed that their lands joined; they did not recognize the small gore lot 10. Afterwards Symington cleared up to the post, and both plaintiff and Symington occupied for many years according to Salter's line.

In 1868, Mr. Albert Salter made a survey, commencing at high water mark on the lake shore, on the south side of 20, and ran east 103 chains 40 links to a post at the corner of the fence, said to have been planted by his brother. At 51 chains 70 links, he found a post said to have been planted by McGlashan, a Provincial Land Surveyor. The oblique line was north  $54^{\circ}$  east magnetic, and was in the general direction of the shore. He ran the line from the lake shore between 20 and 21, until he came to a blaze on the oblique line, where he found the brush fence.

Messrs. McMillan and Davidson, two Deputy Provincial Surveyors, surveyed the land in dispute in January last. They were called as witnesses for the defendant. They commenced on the south side of the concession road between lots 10 and 11 in the gore. This point was admitted to be an original boundary. They chained to the top of the bank on the lake shore, and made the distance 108 chains and 40 links; from thence to the water's edge 2 chains and 17 links; in all 110 chains 57 links. At a distance of 16 chains 80 links west from the post between 10 and 11 in the centre of the concession line, they turned

a line  $36^{\circ}$  to make the rear of the lake-shore lots, the 16 chains and 80 links being the distance Rankin gave on his plan as the front of lot 10 on the concession line. That left 94 chains, 44 links as the length of lot 20 to the water's edge. They could not find the line between 20 and 21. They chained over to the line between 21 and 22; it was 37 chains, 85 links obliquely, giving each lot 18 chains,  $92\frac{1}{2}$  links; the perpendicular for each lot would be 11 chains, 12 links, nearly; this would give lot 20  $104\frac{1}{4}$  acres. Taking out the road allowance, according to their survey, there was left to the plaintiff 101 acres, as being lot 20. There would be 68 acres and over in lot 11, and  $9\frac{44}{100}$  acres in lot 10. They went by the measurement of lot 10 in the gore as given by Rankin's plan, not by the patent or field notes, to ascertain the side of lot 20.

On the 21st January, 1867, a patent was issued to the defendant for gore lot 10 in the 11th concession of Plympton, described as containing 9 acres, more or less; but there was no description by metes and bounds.

The plaintiff contended that the front of lot No. 10 in the 11th concession was only 4 chains and 23 links, instead of 16 chains and 80 links, as contended for by defendant, and that the line between 10 and 11 should also be proportionately shortened, so that the quantity of land in 10 would be reduced from  $9\frac{44}{100}$  acres, and No. 11 would also be reduced in quantity from that called for by the patent.

He contended that he was entitled to the 103 chains from Lake Huron mentioned in his deed: that the office plan, from which all the deeds were drawn, called for a road in rear of these lots: that if no such road was laid out on the ground, no line was run to define the rear boundaries, and though Rankin's plan shewed a line, such line was never run, any more than the allowance for road on the office plan which is there shewn. The plaintiff, therefore, contended that, under his deed and the office plan, his lot extended to the 103 chains.

The defendant claimed that Rankin did in fact run the concession line between the 10th and 11th concessions, and

his plan shewed, what the actual survey shewed since, that there was sufficient land to give to plaintiff's lot the 100 acres his deed called for, and to No. 10,  $9\frac{44}{100}$  acres, while the deed only called for 9 acres; and to lot No. 11 over the 68 acres required by the deed: that the grant of No. 11 preceded that of 20 on the lake shore, and must pass to the grantee the land it covers, which would be interfered with by allowing the plaintiff's lot to extend to the distance of 103 chains from Lake Huron: that the fixing of the boundary of lot 11 would also determine that of lot 10, for there could be no doubt they were intended to be on a continuous line, and that line would be on the same course to the concession line between the 10th and 11th concessions, and would define the rear line of the plaintiff's land, and the boundary there between him and defendant.

It was then agreed, as already mentioned, that the verdict should be for the plaintiff, damages \$10, with certificate for costs, subject to the opinion of the Court, who were at liberty to draw inferences of fact as a jury might, and order a verdict to be entered for defendant if they should think under the evidence he was entitled to the verdict; and the description of lot No. 11 was not to be read if it was not receivable in evidence.

The case was argued during Easter Term, 1869.

*Becher*, Q. C., for the plaintiff. There is no allowance for road in the original survey, and no line run in rear of the lake-shore lots. The distance called for by the deed must prevail if there be no other means of determining the rear of the lot. The plan from which the description is made out being compiled from all the surveys, and used for the purpose of making the descriptions, must prevail, rather than Mr. Rankin's mere plan; that only shewed what his intention was. No doubt Rankin's work on the ground would prevail whenever he did such work. It is not contended he ever planted a post to define the south-easterly corner of lot 20, though his plan refers to a distance from a post which he did plant. His field notes do not shew that he placed a post at the corner of 20, in dispute; therefore his plan, which was not binding, was not adopted by the

government as to that point. The plan they adopted was different, and if followed would give the land to the plaintiff.

The deed of lot 11 does not contain any description, and the instrument produced, purporting to be a copy of the original description, is no evidence. The description should have been embodied in the deed. Being kept in the hands of the government, it cannot bind these parties any more than if in the hands of a private owner who should sell : *Jamieson v. McCollum*, 18 U. C. R. 455 ; *Dixon v. McLaughlin*, 1 E. & A. 370 ; *Martin v. Crow*, 22 U. C. R. 485 ; S. C. in appeal, 2 E. & A. 425 ; *Henderson v. Harris*, 10 C. P. 374 ; *Doe Murray v. Smith*, 5 U. C. R. 225. Even if the prior grant of 11 prevails, the plaintiff is still entitled to hold his verdict as to all of lot 10, as contended for by defendant, to within 4 chains and 23 links of No. 11.

*C. Robinson*, Q. C., contra.—Ninety-one chains gives the lot of which the plaintiff owns a part 100 acres. He claims that it covers much more. In the patent for 20 and 21, by their description, only 200 acres are mentioned, not more or less, and though description as to quantity does not necessarily bind, the leading feature of the grant governs. Both parties must be governed by the plan, as there are no defined limits. The plan that should govern is that made by the surveyor himself, who had the best knowledge of the locality. There is land enough to give each patent the quantity named in it, and no work on the ground to compel a departure from the strict justice of deciding so as to give to each the quantity of land his patent calls for. *Regina v. Hunt*, 16 C. P. 145, S. C. in Appeal, 17 C. P. 443, shews that the Crown Lands Department have no right to alter the original plan, so as to change or close up road allowances. *Regina v. Bishop of Huron*, 8 C. P. 253 is authority that a plan of survey, even before it is returned to the Crown Lands office, may be used to ascertain the boundary of a lot of land when the grant would otherwise be held void : *Doe Campbell v. Crooks*, 9 U. C. R. 639 ; *Holmes v. McKechin*, 23 U. C. R. 52 ; *Martin v. Crow*,

22 U. C. R. 485 ; *Fields v. Miller*, 27 U. C. R. 423 ; *Marrs v. Davidson*, 26 U. C. R. 647 ; *Carrick v. Johnston*, 26 U. C. R. 69 ; *Iler v. Nolan*, 21 U. C. R. 315 ; *Dunn v. Turner*, 3 C. P. 104 ; *Lyle v. Richards*, L. R. 1 H. L. 222.

The description of lot 11 from the Crown Land Office was admissible. Such descriptions were put in in *Holmes v. McKechin*, 23 U. C. R. 57, apparently without objection ; *Clarke v. Bonnycastle*, 3 O. S. 337.

RICHARDS, C. J., delivered the judgment of the Court.

If Rankin had planted a post 16 chains and 80 links west from the post planted between lots 10 and 11 in the 11th concession, to indicate the east corner of lot 20, fronting on Lake Huron, and the westerly limit of lot 10 in the 11th concession, I have no doubt the post so planted would exclude the allowance for road at that point referred to in the patents under which the plaintiff and defendant claim to make title. *Carrick v. Johnston*, 26 U. C. R. 69, seems an express authority on that subject. If a post had also been planted at the south-east corner of lot 26, fronting on Lake Huron, as the point to which the line north, 54° east, to be projected from the south-east corner of 20 in the same concession, was to run, then by extending that line there is no doubt the rear of the lots in front on Lake Huron would be shewn, and if the exact description did not lead to that line, still the deed would cover the whole of the lot which would be mentioned in it. The cases referred to in the argument would seem to go to that extent. But here no such posts were planted, no such line was run, and no road such as is referred to in the deed was laid out on the ground.

In the absence of any work on the ground to make it inoperative, or to shew that the surveyer had done anything to the contrary, I should have thought, but for some of the observations made in the case above referred to in 26 U. C. R., that the Crown Land Department, in compiling the map to be used by the Department from the different surveys, might have made any change not inconsistent with

the work on the ground which would have facilitated the granting of the lots surveyed, and made the boundaries of the lots more certain, and if it was necessary to effect that object, even an allowance for road might be left in the rear of the lots which fronted on Lake Huron, and have so been laid down on the plan. The reasoning in the case referred to seems to be, to some extent, against this view, but I think that case can be distinguished from the present, for by the work on the ground, as I understand that case, the posts planted really indicated no road there, but, on the contrary, the post shewed it was planted as indicating the division line between the two lots, and was marked 20 and 21, shewing they were adjacent to each other, and no road allowance was laid out or posted between them, and in this view the actual work on the ground conflicted with the plan and the field notes as corrected, which were given in evidence on that trial. If a post had been planted here to indicate the south-east corner of 20 in the Lake Shore concession, that would, according to the case in 26 U. C. R., have governed, but no such post being planted our view will not conflict with that case.

The shore of Lake Huron is not on a straight line, though the general bearing of the coast can, no doubt, be easily ascertained. But if the view of the case suggested by the defendant be carried out, and each lot is to be 91 chains deep, and the rear is to correspond with the front, so as to be exactly parallel with it, then we shall have a different course for every lot in rear, and instead of being a continuous line, as indicated on the office plan as well as Rankin's, we shall have a serrated line containing points and angles jutting in and out of each of the lots in the 11th, 12th, and 13th concessions, these lots being all that are shewn to us by the parts of the plans given in evidence. The sketch of the lots in the report of the case of *Holmes v. McKechin*, 23 U. C. R. at p. 53, laid out fronting on the Ottawa River, will give some idea of the irregularity in each lot at the rear, with this difference, that where the rear line is an oblique one the irregularity will be much greater in the form of the rear of each lot.

. If then, with a view of avoiding this, the Crown Lands Department decided to place an allowance for road in the rear of these lots, starting it from the road allowance between the 10th and 11th concessions, and at a distance of 103 chains from the Lake, and extending it on the course north  $54^{\circ}$  east to the south-east angle of lot 26, and the distance as to each was to be determined by the scale on the map, I incline to think this may be done, when there is no work on the ground to prevent it, and when it would be for the advantage of all that it should be done.

If this road is to be ignored because not laid out on the ground, so is any line there to indicate the rear of these lots fronting on the Lake, for no such line was ever run, nor were posts ever planted to indicate the line. The scheme of survey contemplated these lots to contain 100 acres. If the lots were clearly defined they would pass by the grant, though the description did not cover 100 acres, or covered more. But not being defined by actual survey as to their rear termini, and the adjoining lots being in a similar position as to some of their boundaries, we must, if we ignore the road referred to, endeavor to discover if the conveyance made before the plaintiff's grant has any effect, or if it is void for uncertainty.

The description of lot 11 in the 11th concession of Plympton, which was granted in December, 1836, commences at the post planted at the south-west angle of the lot (this post is admitted, and stands on the line between 10 and 11), then north 10 chains (this distance in Rankin's map is stated to be 12 chains, 50 links), more or less, to the allowance for road in rear of the lots fronting on Lake Huron. If there is no such allowance, as is now contended, what are we to do? *Fields v. Miller*, 27 U. C. R. 423, decides in effect that the mentioning of the allowance for road is *falsa demonstratio*, and therefore that line of the lot just goes to the ten chains. The description proceeds, then north  $54^{\circ}$  east 36 chains. This does not say along the said allowance for road, but the course is the same as that laid down for the allowance for road. The other courses of the lot and distances can be traced according to the original survey.

The next grant, in point of time, is that under which the plaintiff claims. It is dated March, 1839. The description of the 200 acres composed of lots 20 and 21 in the front concession on Lake Huron, is as follows: Commencing in front upon Lake Huron, in the limit between lots 21 and 22; then east 103 chains, more or less, to the allowance for road in the rear of the said lots. Discussing this question as we did the description in No. 11, we find no allowance for road in rear of the lots, and we are told, if the lots are to be but 200 acres, as the deed calls for, the rear of the lots should be but 91 chains. But discarding the allowance for road as *falsa demonstratio*, and considering the grant carries us 103 chains, we meet with this difficulty: the grant of No. 11 extended 10 chains north from the south-west angle of that lot in search of the allowance for road. That not being found, the lot is supposed to stop there, and then its next course is north  $54^{\circ}$  east to the division line between 11 and 12. This line of No. 11, where it strikes the division line between 21 and 22 in rear, as I understand it, does not give 103 chains as the depth of No. 21, but shortens that line, diminishes the depth of the lot until the diagonal line in rear of lot 21 comes to the point from whence the rear diagonal line of No. 11 starts on its course N.  $54^{\circ}$  east; or if it does not do this, then it stops as soon as it reaches the rear diagonal line of No. 11, and then goes south  $54^{\circ}$  west 36 chains, more or less, to the allowance for road between the 10th and 11th concessions; then west 103 chains, more or less, to Lake Huron; then north-easterly along the water's edge to the place of beginning.

If the rear of the lots in front is to be determined by the prior date of the grants of the lots in rear, we shall have them shifting with every patent that is issued. But if the allowance for road made on the plan, and called for by all the deeds, can, with the aid of the plan and the work on the ground, be fixed, it seems to me that view of the case is more satisfactory.

We know that grants of land in the early settlement of the country were made before any actual survey took place, from mere plans, and scaling of the rivers. Some of the cases referred to, where the effect of the description of lands granted on the River Thames was discussed, shew that the grants were made before any survey; yet it was never doubted that these grants were good, and the plans on which the grants were made were frequently referred to with a view of making the grants certain. See *Holmes v. Munro et al.*, 7 C. P. 433.

I see no reason to doubt that this plan and the deeds with the work on the ground being referred to, the position of the road in the rear of the lots fronting on Lake Huron, running north  $54^{\circ}$  E. from the concession line between the 10th and 11th concessions can be ascertained.

I understand from the evidence given at the trial that the distance from the undisputed post between lots No. 10 and 11 to the water's edge of Lake Huron is 110 chains and 50 links, by actual measurement now. What it was at the time the grants and plan from which the original descriptions were prepared were made, if different at all from what it is now, does not appear. The distance on the plan, according to the scale and the grants, as I understand the evidence, is about 118 or 119 chains, made up as follows: from the water's edge of the lake to the road in the rear, 103 chains; then for the road 1 chain; from thence to the eastern boundary of No. 10, 15 chains. If the actual distance be 110 chains and 50 links, then the deficiency is 8 chains and 50 links. Then fixing the road where it was intended it should be placed at the proportionate distance from the lake shore and the eastern boundary of No. 10, the following I suppose would be the result: No. 10 would be about  $13\frac{3}{4}$  chains wide, instead of 15, as the plan seems to shew it to be, and the lot on Lake Huron  $95\frac{3}{4}$  chains instead of 103, as the plan and the deed would seem to call for. There is no work on the ground to conflict with this, and this way of working it out seems to accord with the spirit of the Surveyors' Act. The metes and bounds of No. 10 are not mentioned in the deed produced,

nor were they proved at the trial, but looking at the map I assume the width of No. 10 on the concession line between the 10th and 11th concessions to be 15 chains.

The place for the road in rear of the lots fronting on Lake Erie being found on the concession line, the course N. 54° east, I apprehend, can be easily ascertained, and in this way it appears to me the boundary of all the lots can be ascertained and defined.

On the other hand, if the course suggested by the plaintiff be followed out, the intention of the government, exhibited in the plan and by the grants themselves, of making the lots of uniform length and on a continuous line, will be frustrated, whilst in the view pressed by the defendant the government plan and the descriptions in the grants are entirely ignored, and the road obliterated, because Mr. Rankin in the original survey shewed a triangular piece of land which, if a certain scheme of survey were carried out, and no allowance for road left in rear of the lots fronting on the lake, would contain 10 acres, and the breadth on the 10th concession line would be 16 chains, 80 links—whereas the government before making any grants determined, as their plan shews, that there should be an allowance for road when Rankin had only indicated a line and not a road, and had never planted any post to define even the terminus of the line; the government also deciding to make the front lots 103 chains deep instead of 91, which would suffice to make the 100 acres, and in their grant of No. 10 only calling it 9 acres instead of 10, as Rankin marked it on his plan, and the width of No. 10 to be 15 chains instead of 16 chains 80 links, as Rankin marked it.

If, with the views now expressed, the parties can decide whether the defendant has been guilty of a trespass, then the verdict can be entered for, and *postea* delivered to, the plaintiff. If it appears that he has not been guilty of trespass, it can be entered for the defendant, and if the facts are not sufficiently ascertained, there can be a new trial.

On the evidence given for the plaintiff there is great doubt as to how far any act of trespass was proven, but the witness Carnaghan, called for the defendant, stated that

he worked for defendant when the fence was built, and was sent by him to plaintiff to ask if he might put up the fence ; at first he said not, but afterwards said defendant might go to work and put the fence on the line Davidson had run, and it was put on this line.

On the other hand, in the statement of the case prepared and put in by the plaintiff, it is stated, " If the Court hold that the plaintiff is entitled to 103 chains, encroaching upon what the defendant calls lots 10 and 11, or either of them, then the verdict will stand ; if not, the verdict will be for the defendant."

We do not think the plaintiff is entitled to the 103 chains, and if the decision were to follow on the statement above quoted it would be for the defendant. From the Judge's notes as laid before us I understand the case went off on the understanding that the verdict was entered for the plaintiff subject to the opinion of the Court, who were to draw inferences as a jury, and order a verdict for defendant to be entered if they considered him entitled to it.

If the defendant built the fence on Davidson's line, that would be 94 chains 44 links from the water's edge, whilst the rear of No. 20, as I understand it, would be 95 chains 75 links from that point, and the trespass would then be on the plaintiff's land. There may be some mistake however in my calculation, and if there is any doubt about it the matter must be put right, either by the understanding of the parties or sending the case back again.

I think there can be no doubt as to the rule which the Court think ought to be acted on in ascertaining the limits of the respective lots, and we are of opinion there ought to be no difficulty now in the parties themselves verifying the facts to which to apply the rule, so as to say whether the verdict should be entered for the plaintiff or defendant.

We see no reason why the plan on which these grants are made may not be referred to, to aid in interpreting the grant, and as shewing what the Government intended should be the boundaries of the land they were granting.

The plaintiff's counsel objected to the full description of No. 10 being given in evidence as shewing what the Crown

intended to grant by the patent. We see no objection to that evidence. It is well known that the lots that are described in the patent by these numbers and concessions are granted from the plans and surveys supposed to be made, and these documents being of a public nature may be always referred to, as shewing the basis on which the grant was made. The grant of lot No. 1 in the town plot of the town of——, as laid out by Provincial Surveyor—— for——, a plan of which town is registered in the Registry Office of ——, would be good, and the description by metes and bounds from the survey as actually made and laid down on the plan I think would always be received in evidence to shew what was granted. If this would be permitted in case of a town plot laid out for a private person, *a fortiori* if by a department of the Government (*a.*)

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## TAYLOR AND THE CORPORATION OF THE TOWNSHIP OF WEST WILLIAMS.

*By-law to divide a School Section—Notices—Seal—Delay in moving.*

Application to quash a by-law passed on the 14th of August, to divide a School Section, on the ground that it was not under the seal of the Corporation, and that it did not appear that all parties to be affected had been duly notified of the intended step or alteration.

Upon the affidavits on both sides, set out below, the Court were satisfied that the seal had been duly affixed.

As to the notice, the applicant swore he had received no notice of the intention to divide the section or pass the by-law, and believed the Corporation gave none, and this was confirmed by the local superintendent. On the other hand, it was sworn that the Council in February received petitions, numerously signed, for the division, which they directed to stand over until their next meeting, on the 14th of August, and instructed the Clerk to give the necessary notices that such petitions would then be considered, and that such notices had been seen in an hotel, in the post-office, and in the school-house. In reply the Clerk denied receiving such instructions, and a person who had lived at the hotel, and the Postmaster, swore that they had never seen the notices. The Court refused to quash the by-law, for the affidavits only denied notice of intention to divide the section or pass the by-law, not of the application; the Council had acted upon reasonable assurance that all parties had notice of such application, which no inhabitant of the section had denied knowledge of; and the objections being technical should have been taken promptly, without allowing a term to elapse.

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(*a.*) The parties not being able to agree, a new trial was granted, with costs to abide the event.

IN Hilary Term last, *M. C. Cameron*, Q. C., obtained a rule *nisi* calling on the Corporation to shew cause why their by-law or resolution passed on the 14th of August last, called By-law No. 87, to divide School Section number six of the said Township, should not be quashed, with costs, on the grounds : 1. That all parties to be affected by the alteration of the boundaries of the section were not duly notified of the intention or application to make such alteration, nor did it at the passing of such by-law or resolution appear that all parties to be affected by the alteration had been duly notified as required by law.

2. Because the said by-law is not under the seal of the Corporation, and is invalid as a by-law, and a by-law was necessary to make the alteration, and so said by-law is not valid as a resolution ; and upon grounds disclosed in affidavits and papers filed.

In moving for the rule there were filed, 1. The affidavit of *James Taylor*, of the village of Park Hill, in the said Township, merchant, made on the 2nd of February, 1870, stating that he was a resident freeholder and householder of the Township : that he obtained the annexed copy of by-law and the certificate thereunder written from Donald McLeod, the Clerk of the Municipal Council of the Township : that the seal attached to the certificate is the seal of the Council : that previous to the passing of the by-law he never received any notice whatever of the intention of the Municipal Council of the Township to divide school section number six, or pass the said by-law to divide said section : that he was a resident freeholder and householder in said school section number six, now called School Section Number Five, by the said by-law : that he was interested in the passing of said by-law, as the dividing of the said section would be a great disadvantage to his children attending school, and greatly impair the facility for having a good school : that he had good reason to believe, and did verily believe that the said Municipal Council gave no notice of their intention to pass said by-law.

There was appended to the affidavit what purported to

be a copy of by-law 87. It recited that it was expedient to pass a by-law for the purpose of dividing school section number six of the Township, and that a portion of it be erected into a new school section, No. 5, of the Township. It defined what should constitute the new school section, by referring to the lots or half lots to compose it, and concluded : " Done and passed in open Council, this fourteenth day of August, in the year 1869." Then the signature of " DONALD MCLEOD, *Township Clerk, West Williams.*"

Beneath it was written the certificate of the same Donald McLeod, Township Clerk, "that the above is a true copy of a by-law passed by the Municipal Council on the fourteenth day of August, 1869," and the seal of the Township was affixed.

There was also filed on moving the rule the affidavit of *Charles Gordon Munro*, sworn 2nd February, stating that he was the local superintendent of schools for the said Township, and that he never had or received any notice from the Municipal Council of the Township of their intention to alter school section No. 6, or pass a by-law dividing said section, nor had he ever received from the Clerk of the Municipality, or from any one, any copy of the proceedings of the Council relating to the alteration or division of said school section No. 6.

The rule was enlarged until this term, when *C. S. Patterson* shewed cause, and filed the following affidavits :

That of *Thomas Elliot*, sworn 10th of May, 1870, stating that he was one of the Councillors of the Township in 1869 : that on the 20th of July, 1869, John Noble, Donald McClure, and James Taylor, the party applying in this matter, petitioned the Council to divide the school section No. 6 into two sections : that on the 24th of February, another petition was presented to the Council by John James, James Purvis, and about thirty other persons, also praying the Council to divide the said section ; and a resolution was passed by the Council, that the consideration

of the said petition should stand over till the next meeting of the Council, and the Clerk was instructed by the Council to post the necessary notices, intimating to all concerned that the petition would be considered at the next meeting of the Council, to be held on the 14th of August, 1869 : that after the passing of the resolution, and before the 14th of August he saw a notice stuck up in the Victoria Hotel, Park Hill, and one in the Post-office, Park Hill, signed by William K. Cornish, who was then Clerk of the Council, stating that at the next meeting of the Council the question of the division of the section would be discussed : that a meeting of the Council was held on the 14th of August, and the question came before the Council pursuant to notice : that at the meeting another petition was presented to the Council, signed by Donald McLeod and about fifty others, also praying the Council to divide the said section ; and at the said meeting it was moved by him (deponent Elliott) seconded by John Dawson, and carried, that the section should be divided into two, the new section to consist of lots 5, 6, and the south half of 7, in the 20th concession of West Williams, and lots 5, 6, and the north half of 7, in the 19th concession, and to be called School Section No. 5, and the Clerk was then instructed to draft a by-law to that effect : that the Clerk stated that the seal of the Corporation was at his house, and the Council adjourned to enable him to procure the same : that they shortly afterwards assembled, and the Clerk drafted a by-law, which was properly passed, signed by the Reeve, and the corporate seal of the said Township was affixed by the said Clerk in his (Elliott's) presence, to the by-law : that on the same day the said Cornish resigned his office of Clerk of the Council, and Donald McLeod was appointed to the office : that he was not present to receive the papers belonging to the office : that the same, including the by-law and the petitions referred to in the affidavit, were left with Simon McLeod, Esq., the Reeve of the Township, to be handed over to the Clerk : that some time after he asked the Clerk, Donald McLeod, to produce the by-law and

petitions filed in reference to the matter, and he produced the by-law without a seal, and said that the petitions never came into his hands and he could not produce them. He stated positively that the by-law passed on the said 14th of August, 1869, dividing the said school section as aforesaid, was properly sealed with the seal of the said municipal corporation, and was handed to the said Reeve as aforesaid, and that the copy of the by-law annexed to the affidavit of James Taylor, filed on this application, was not a true copy of the by-law dividing the said section, passed on the said 14th of August, 1869, by the said Council: that he verily believed due notice was given previous to the said 14th of August by the Council that the subject of dividing the said section would be considered at the meeting of the Council on the said 14th August; and he verily believed it was generally known amongst the freeholders and parties interested in the said section that the division of the section would be considered at the said meeting.

The affidavit of *John Dawson*, sworn to on the same 10th of May, stated that he was Deputy Reeve of the township in 1869, and all the other facts substantially as stated in Elliott's affidavit: that he believed William K. Cornish, the Clerk, did properly post the notices as he was directed by the resolution of the Council: that he saw a notice put up in the village of Park Hill, which was signed by Cornish, to the effect that the question of dividing the section would be considered by the Council on the 14th of August. He stated that the by-law was drawn up and was signed by the Reeve, and the Clerk affixed the seal of the Corporation thereto in his presence, and the by-law was in every respect regular. He referred to the Clerk's resignation and the papers being taken by the Reeve for the new Clerk, and said that on applying to the new Clerk afterwards for copies of the petition, he informed him they were not in his possession. He repeated positively that the by-law passed on the 14th of August dividing the section was properly sealed on the day the same was passed, and the copy

annexed to Mr. Taylor's application was not a true copy of it.

The affidavit of *John McDonald*, sworn to on the same 10th of May, stated that he was a Township Councillor of the Township in 1869: that a by-law was passed on the 14th of August dividing school section No. 6 into two sections, the new section called No. 5, (he named the lots and half-lots comprising the new section): that the by-law was drafted, read three times in open Council, and passed in the usual way.

The affidavit of *Thomas Plewes*, made on the 10th May, stated that about the 5th August last he saw a notice posted on the school house in section 6 of West Williams, purporting to be signed by Cornish, as Clerk, to the effect that all parties interested should take notice that the question of dividing the said school section would be brought before the Council on the 14th August: that he was aware that at the said meeting the question was brought up, and believed the section was divided.

*William Elliott*, by his affidavit, sworn to on the 10th May, stated that about the first of August last he saw two notices, one stuck up in the bar-room of the "Victoria Hotel," and the other in the post-office, in the village of Park Hill, stating that at the meeting of Council on the 14th of August the subject of dividing school section No. 6, of West Williams, would be considered: that the notices were put up in prominent places in the hotel and post-office, and purported to be signed by W. K. Cornish, Clerk of the Municipality.

*C. S. Patterson*, in shewing cause, referred to the following cases:—as to the want of a seal, *Croft and the Municipality of Brooke*, 17 U. C. R. 269; *Buchart and the Municipality of Brant and Carrick*, 6 C. P. 130; as to the want of notice, *Lafferty and the Municipal Council of Wentworth and Halton*, 8 U. C. R. 232; *Fisher and the Municipal Council of Vaughan*, 10 U. C. R. 492; *Ianson and the Corporation of Reach*, 19 U. C. R. 591; *Cotter and the Municipality of Darlington*, 11 C. P. 265.

*M. C. Cameron*, Q.C., contra, supported the rule, referring to 29-30 Vic. ch. 51, secs. 192, 198; Consol. Stat. U. C. ch. 64, secs. 39, 40. He also asked leave to file the following affidavits in reply :

1. The affidavit of *William King Cornish*, sworn 21st May, stating that he was Clerk of the Municipality in 1869, until the 14th of August: that on that day he received instructions to draft a by-law for the division of school section No. 6 of the Township, and it was drafted by him, and signed by him as Clerk, and by the Reeve of the Council, but, he stated, "I have no knowledge whatever of attaching the corporate seal, or any seal, to the said by-law:" that he had examined the by-law No. 87, now in the hands of the present Clerk of the Municipal Council of the Township, and found no seal attached to the said by-law, but the said by-law was in his handwriting: that he never put up or posted any notice whatever of the intention of the Municipal Council to pass said by-law No. 87, nor did he ever receive any instructions from the members, or any one of them, to put up or give such notices: that the by-law was passed on the 14th August, 1869.

The affidavit of *Simon McLeod*, sworn 21st May, stated that he is now, and was, in 1869, Reeve of the said Township: that he and the majority of the Township Councilors opposed the attaching of the corporate seal to the by-law to divide school section No. 6, and the same was not put thereon: that he and a majority of the Township Councilors were opposed to defending the rule in the Court of Queen's Bench to quash the by-law, as he verily believed and did then believe the same was irregularly passed.

The affidavit of *Donald McIntosh*, sworn 21st May, who stated that he had lived at the "Victoria Hotel" for the last two years: that he never saw any notice whatever stuck up or posted in or near said hotel, of the intention of the Municipal Council to pass a by-law for the dividing of school section No. 6, and he never saw any notice whatever of such intention: that had there been any notice stuck up or posted of such intention, he would have seen the same.

*John Noble's* affidavit, sworn 21st May : He stated that he was Postmaster at Park Hill : that he was constantly attending to the duties of Postmaster there : that he had not been absent from said post-office for any length of time for the last twelve months : that he never saw any notice whatever respecting the division of school section No. 6 ; and had the said notice been posted or stuck up in the post-office he would have seen the same, and he verily believed the same never was posted up.

There was the further affidavit of the present Clerk of the Municipality, shewing that a resolution, moved on the 17th January last in the Council, instructing the Clerk to put the corporate seal at once to by-law No. 87 was lost, and also another resolution directing the Clerk to notify the Local Superintendent of Schools of the passing of the by-law, and that he should furnish him with the boundaries of section No. 5 : that he had examined the by-law No. 87, and the corporate seal was not attached thereto, nor a seal of any kind : that he had examined the book of the Municipal Township, and found no rule or resolution that any notice should be given of the intention of passing such by-law.

*Donald McLeod*, the Clerk from the 14th of August to January, stated that he did not receive any instructions to put up any notice about dividing the section, nor did he do so.

RICHARDS, C. J., delivered the judgment of the Court.

We are satisfied from the affidavits filed by Mr. Patterson, that the by-law was regularly passed on the 14th of August, signed by the Clerk and the Reeve, and had the seal of the Corporation attached to it at the same time. Mr. Dawson, who was the Deputy Reeve of the Township that year, and Mr. Elliott, who was a member of the Council, by their affidavits state this positively. Another member of the Council speaks of the passing of the by-law, of its having been read a second and third time, and of its being passed in the usual way.

The affidavits shew that the by-law properly authenticated and sealed, the petitions and other papers, were taken by the Reeve of the Township to be handed to the newly appointed Clerk, and that these petitions never reached the hands of the newly appointed Clerk, and the only by-law he received had not the seal attached to it.

Mr. Cameron filed the affidavit of this very Reeve, Mr. Simon McLeod, who is also Reeve for the present year. It was made on the 21st of May, and he then no doubt knew the facts I have referred to about the seal having been affixed to the by-law, and that it was signed by him on the 14th August last, had been stated in the affidavits filed on this application; yet he does not deny these statements, but contents himself with saying that he and the majority of the Township Councillors opposed the attaching of the Corporate seal to the by-law, and the same was not put there. Does this gentleman by this statement mean to deny what was stated in the other affidavits, that the Corporate seal was affixed to the by-law on the 14th of August, 1869? If so he he had a most unhappy way of putting it. Or does he only mean to say, that on the 17th January, 1870, when the question of attaching the seal to the by-law came up, that he and a majority of the Councillors were opposed to that being done, and that it was not done. If that is what he means, and I think it must be so, or it would have been very easy to deny in express terms that on the 14th of August the seal was affixed to the by-law passed on that day, then this looks very like an attempt to impose on the Court by the *suggestio falsi*.

Then Mr. Cornish, the then Clerk of the Council, says the by-law was drafted by him and signed by him, as Clerk of the Council, and the Reeve of the said Council; "but I have no *knowledge* whatever of attaching the corporate seal or any seal to the by-law." He further adds he had examined By-law No. 87, now in the hands of the present clerk of the municipality, and finds there is no seal attached to it, but the by-law is in his handwriting.

He has *no knowledge of attaching the seal*.—Does that mean he does not recollect whether a seal was attached to the by-law or not; or that he does not know whether he attached the seal or whether some one else did so? At all events he does not deny that the seal was attached. Then as to the copy of the by-law he saw in his own handwriting, does he say that it was the only copy of that by-law that he prepared, and inasmuch as it had no seal to it the by-law never could have had a seal to it, for he only prepared one copy? He does not state anything of the kind.

We therefore come to the conclusion that the by-law passed on the 14th of August, 1869, dividing this school section, had a seal to it.

The next question is, whether proper notice was given of a proposed alteration of the school section. Sec. 40 of the School Act, Consol. Stat. U. C. 64, enacts, "In case it clearly appears that all parties to be affected by a proposed alteration in the boundaries of a school section, have been duly notified of the intended step or application, the Township Council may alter such boundaries."

In *Ness and The Municipality of Saltfleet*, 13 U. C. R. 20, Sir J. B. Robinson said, "It is not required of the Council to give the notice, but it is left to them to be satisfied that it has been given. They are made the judges of the *due notice*; and we are to presume, in the first instance, at least, that it did appear to them that the act in that respect had been complied with. \* \* \* There is every probability, from the papers before us, that the intention to make the change that has been made was fully known."

There were affidavits filed in that case shewing there had been school meetings held in relation to the change sought, and resolutions passed approving of the same, and other facts to shew that the contemplated change was generally known.

In *Ley and The Municipality of Clarke*, 13 U. C. R. 435, the same learned Judge remarks, "They are bound to see that those to be affected by the alteration had notice

of their intention to make it. It is objected that such notice was not given. \* \* \* It is evident the inhabitants had notice, for they met and discussed the proposition before the by-law was passed, and they sent to the Municipal Council notice of their disapproval. They have, therefore no reason for objecting a want of notice. \* \* \* If they have had such notice, as it appears they had in this case, their disapproval of the change does not disable the Municipal Council from carrying it into effect, if, after hearing the objections, they should think it expedient to do so."

The affidavit of Mr. Taylor on this point is, that previous to the passing of the by-law he never received nor ever saw any notice whatever of the intention of the Council to divide the section, or to pass the by-law to divide said section,

The affidavits in answer, filed by Mr. Patterson, shew that as early as February, 1869, Taylor and others petitioned the Council to pass a by-law to divide this section: that on the 24th of July a petition signed by about thirty persons, in favor of dividing the section, was presented to the Council, who passed a resolution to take it into consideration at the meeting of the Council, and the Clerk was directed to give notice that the petition would be considered at the meeting of the Council on the 14th of August. Several depositions speak of the notices being put up, one in the Victoria Hotel, and post-office, another in the school-house.

The affidavits in reply to these are those of the post-master and the keeper of the hotel; the latter that he never saw any notice put up in the hotel of the intention of the Council to pass a by-law for the dividing of the school section; the former that he never saw any notice whatever respecting the division of school section No. 6, and had there been such a notice he would have seen the same.

Then in Mr. Cornish's affidavit, he says he never put up or gave any notice of the resolution of the Council to pass the by-law, nor did he ever receive instructions so to do.

The statute only requires notice to be given of the intended step or application. It was not necessary to give notice they intended to pass a by-law, but of the step or application, and the affidavits in denial do not meet the point, that the notice of the application was given, and that the Council would consider the matter on the 14th of August.

The fact of petitions being presented, signed by a large number of persons, and the adjournment of the Council and the giving of the notice when the petition would be taken into consideration, are in themselves the kind of acts and means of notice spoken of in several of the cases as sufficient to shew that the Council acted on reasonable assurances that all parties interested had received notice of the intended step or application. And no single inhabitant of the section states that he had not notice that the application had been made, and was to come before the Council for their consideration on the said 14th of August.

This kind of objection the decided cases say ought to be taken promptly. The by-law was passed on the 14th of August. If it had been promptly moved against on the ground of want of notice, and it had been shewn that any of the parties interested had really been ignorant of the intended step or application, the by-law might have been quashed in Michaelmas Term, and a new one passed before Christmas, in time to come into operation last year.

On the whole, we think we ought not to quash the by-law on the material before us, and considering the time the application has been made. It is true the delay has not been as great in this case as in some of the others referred to; but the objections are both of such a purely technical character, that the party seeking to quash the by-law should have applied promptly. No sufficient excuse has been given for the delay, and we can suggest none.

If the Municipality wish the by-law repealed they can do so on giving the proper notice, but until that is done I suppose any person interested in the matter has a right to have the by-law maintained, if sufficient grounds are not made out for quashing it.

We think the rule should be discharged with costs.

See *Griffiths and the Municipality of Grantham*, 6 C. P. 275; *Hill and the Municipality of Tecumseth*, *Ib.* 297; *Isaac and the Municipality of Euphrasia*, 17 U. C. R. 207.

*Rule discharged.*

### MCADIE ET AL V. CORBY.

*Tax Sale in 1855—Objections to—13 & 14 Vic ch. 67—33 Vic. ch. 23 O.*

An action of ejectment to try the validity of a tax title having been begun before the 33 Vic. ch. 23, O., was passed, the Court, under sec. 4, determined the objections taken to the sale, in order to settle the right to costs, in the same manner as if the act had not been passed.

The Sheriff at a tax sale, on the 26th of December, 1855, notified the purchasers that if they did not pay in two or three weeks he would sell the land again. The defendant having purchased portions of certain lots did not pay, and the lots were put up again as whole lots, not by the acre. The defendant then asked those present not to bid, as he had a title to the lots bid off by him at the first sale, which he wished to perfect. Accordingly no one bid against him, and he obtained the lots. What his title was did not appear. *Semble*, that the sale under such circumstances could not be supported; but no opinion was given on this point, as the plaintiff might, under *Raynes v. Crowder*, 14 C. P. 111, be compelled to go into Chancery for relief on such a ground.

*Held*, that the 13 & 14 Vic. ch. 67, secs. 46 and 47, did not make the list of taxes directed to be prepared by the Treasurer binding; and that if the tax was not legally imposed, but merely debited against the lot by the Treasurer, it was not made valid by being entered in such list.

*Semble*, That the advertisement was bad, for not specifying whether the lands were patented or held under a lease or license of occupation.

It was objected also that the land was sold for taxes which had accrued for more than twenty years, and that the sale was adjourned illegally, though a large number of bidders were present. *Semble*, that these objections could not be supported.

EJECTMENT for lots 26 in the 6th concession, 23, 24 and 32 in the 7th concession, 26 in the 10th concession, and 32 in the 9th concession, of the Township of Elziver.

The plaintiffs claimed as owners and purchasers of the land, by descent and otherwise, in direct line from the patentee.

Defendant claimed as purchaser at Sheriff's sale for taxes, by deeds executed in February, 1857.

This action was begun on the 13th of June, 1867.

The cause was tried at Belleville, before *Hagarty, C. J.*, C. P., in the Fall of 1868.

The plaintiffs' title was proved.

The defence under the tax title was then gone into.

*Francis McAnnany* was called. He said, "I have been Treasurer since 1851; I produce a warrant for the tax sales of 1855; it is dated 25th of August, 1855; the lands in question are contained in it; I gave it to the Sheriff; in 1852 all the arrears on wild lands were put in the non-resident roll as the law required.

"I cannot tell how the amount was made up; it was made up from statutable directions; no tax was assessed before 1850; I only know the taxes were five years in arrears from looking at the amount; I believe no taxes were paid from the issuing of the patents (in 1821); when I came into office the rate was 5s. 5d. per 200 acres; I don't know how that was arrived at; I think the amount of taxes claimed is made up by charging 5s. 5d. if it be paid regularly, but after three or five years 50 per cent. was added by statute; the collector's roll produced of wild lands assessments is down to the 1st of January, 1851; it was taken as the basis; I don't know when the 5s. 5d. assessment was commenced; there is no information, I think, in my predecessor's books as to these lots; I sent to the Township Clerk, as required by law, a list showing from my books the amount due on each lot; Mr. Benjamin went to Kingston to get the list of taxes; I can't find that list; it was from it I presume I took the amounts; Benjamin was acting for Mr. Ham, the Treasurer; I did not consider it necessary to enter these sums in a book. I have nothing now in my office to shew the arrears due in 1851, except the roll returned by the Township Clerk in 1852; I found no entry in the books of my office as to taxes on the lot prior to my appointment in 1851; the County of Hastings was set apart in 1839; I suppose Benjamin got at Kingston the amount due up to the separation; all the lots are on the patent book, but I cannot find any entry in the Treasurer's

book as to assessments on these lots; there are some entries of taxes paid on lots for various periods, 19 years, 16 years, &c., &c. The arrears are made out from the time of the patent issuing up to the 1st of January, 1851, as I make it out; can't say if the Quarter Sessions imposed any rate; assessments for 1852 and 1853 appear regularly entered; on each lot two days statute labor are counted at 5s. per day; that was charged in 1853; I presume I made the amount up on 32 in the 9th concession, on 146 acres; I can't explain the difference in the amounts on each lot; in some cases I would infer something might be paid, but I can't refer to any payment in the books; the taxes are made up to 31st December, 1854, with ten per cent. added on the 1st of May, 1855."

*Charles E. Miller*, Sheriff's Clerk, produced the *Gazettes*. He said, the lands were advertised under the Treasurer's warrant for thirteen weeks. The first advertisement was on the 15th of September 1855, the last on the 8th of December following; nothing was said in the advertisement as to whether the lands were patented or not.

26 in 6 con.	marked in book	200 acres sold,	but there is pencilled	99 acres.
23 in 7	"	"	200	" " " " 40 "
24 in 7	"	"	200	" " " " 200 "
26 in 10	"	"	200	" " " " 200 "
32 in 7	"	"	100	" " " " 100 "
32 in 9	"	"	—	" " " " — "

The publisher of the *Belleville Intelligencer*, the local paper, proved thirteen insertions in it, and that the sale was for the 24th of December, 1855.

*J. W. D. Moodie*, the Sheriff, said: I got the Treasurer's warrant on the 25th of August, 1855; I advertised lands in the *Gazette* and in the *Intelligencer*—13 times in each; the sale was on Monday, 24th December, 1855; the defendant's deeds of the lots are dated 8th and 9th of February, 1857; these dates I think are correct as to the days of sale, which differ from the memorandum of sale, being on the 24th of December, 1855; I don't remember if the advertisement spoke of an adjournment.

In reply, *Philip P Lynch* said: In 1855 I was in the Sheriff's office as clerk; I remember the sale; I think there was more than one attempt to sell; the Sheriff when commencing the sale notified those present that the persons purchasing had two or three weeks to pay in; and if they did not do so the lands would be again offered; some did not pay up and the lands were offered on a subsequent day; some persons who had bid, say 40 or 50 acres, bid again and got whole lots; I don't remember seeing defendant there; the room was crowded; nor any representative of his there; I can't say I remember either defendant or Cooke so acting in bidding; don't remember if any notice was put up about the re-sale, if the price of purchase was not paid; as far as I remember, the Sheriff on the second sale mentioned that the lots which had not been paid for, he must sell again; he then put up the whole lots, without reference to the parts which had been sold on the first day; some parties, at the second sale, asked others not to bid as they had claims on the lots.

*Albert Smith* said: I was at the sale; it was after Christmas; it was advertised for the 24th of December; that sale was adjourned for two days; the Sheriff gave that out to those present; many bidders were present; can't say why it was adjourned; I was at it on the 26th of December; a large audience present; all the land was sold; the Sheriff said as to any lands not paid for he would put them up again on a day which he named; I saw defendant at the first sale; I think he purchased part of 31 and part of 4 in the 2nd concession; he bought the first day parts of the lots in question in this suit; at the second sale in January the Sheriff put up the lots which had not been paid for; he put up the whole lots; when the first lot was put up defendant said to the audience that he had a title to all those lots he had bid off at the first sale, and he wished those present to give way and let him perfect his title; accordingly no one bid against him; a good many bidders were there; the title to these lots came to defendant from one *Lingham*, who had failed, I was a creditor of

Lingham's; I was interested in defendant getting a title, so I kept a memorandum of the sale as it went on.

Sundry objections were taken by plaintiffs' counsel, and by consent the verdict was entered for defendant, with leave to the plaintiffs to move to have the verdict entered for them if the Court should be of opinion the defendant's title failed; the Court to be at liberty to draw inferences of fact.

In Michaelmas Term, 1868, *Boyd* obtained a rule calling on the defendant to shew cause why the verdict should not be set aside, and a verdict entered for the plaintiffs, upon the leave reserved, upon the grounds that the tax sale and deeds relied on by defendant were illegal and void, for the following reasons:

1. There was no sufficient evidence given of any taxes being imposed on the premises in question, or of the same being in arrear, and the roll put in for the year 1852 was no evidence of the taxes mentioned therein having been properly imposed and in arrear.

2. Even if there were *prima facie* evidence of taxes been imposed and in arrear, yet that was displaced by the production of the books of the Treasurer, from which the assessment rolls were made up.

3. There was evidence that the lands in question (being wild lands) were assessed for more than could be imposed upon them under the wild land assessment act, and if any additional sum could be imposed beyond the said statute tax, yet there was no evidence that the same had been imposed from year to year, or otherwise, by the Court of Quarter Sessions.

4. The lands were sold for arrears which had accrued, as was alleged, for more than twenty years, which was illegal.

5. The said sale was adjourned illegally by the Sheriff, though a large number of bidders were present on the day for which the said sale was advertised.

6. The Sheriff's advertisements do not state whether the said lands were patented or not.

7. The Sheriff having at the first sale sold a portion of each lot to the defendant, should have insisted on his carrying out the said sale, and it was illegal to hold another sale and permit the defendant to bid in and purchase the entire of each lot.

8. The defendant having purchased at the first sale as aforesaid, was guilty of fraudulent misrepresentation at the second sale, the effect whereof was to prevent competition, and to enable the defendant to get in to himself the whole lots as to which he had been the purchaser of parts at the previous sale; and such a manner of selling is illegal, and contrary to the statute, and void.

In this Term *Harrison*, Q. C., shewed cause. The question in this case relates to the costs only, for the defendant is within the protection of the late Ontario Act, relating to tax sales, 33 Vic. ch. 23. The 13 & 14 Vic. ch. 67, secs. 46, 47, determined that the taxes which should be ascertained in the manner provided for by that act should be taken to be correct; the taxes in question were so ascertained, and they cannot be disputed. *Cotter v. Sutherland*, 18 C. P. 357, therefore does not apply. The production of the Treasurer's books is sufficient evidence of the lot being subject to assessment, of the assessment having been made on it, and of the payment being in arrear: *Hall v. Hill*, 2 E. & A. 569; *Doe dem. Earl of Mountcashel v. Grover*, 4 U. C. R. 23. There is no authority for saying that lands cannot be sold for arrears of taxes due more than twenty years; the taxes are a lien on the land, and the lien continues until it is removed by payment. It is objected that the Sheriff adjourned the sale, but he may do so; and he may adjourn and sell the whole lot, though he had before sold part of it: *Jarvis v. Cayley*, 11 U. C. R. 282; *Mingaye v. Corbett*, 14 C. P. 557; *Henry v. Burness*, 8 Grant 345; *Schofield v. Dickenson*, 10 Grant 226. The advertisements need not recite which lands are patented and which are unpatented, though the warrant to sell must do so: *Hall v. Hill*, *supra*; *Connor v. Douglas*, 15 Grant

456. The defendant denies the alleged fraud charged upon him at the time of the sale. But even if there had been fraud the legal title passed to defendant, and the plaintiffs must proceed in equity to have the deeds vacated : *Raynes v. Crowder*, 14 C. P. 111.

*Boyd* supported the rule. Hastings was set apart in 1839. The list was made up under sec. 46, not under sec. 47. There was no evidence that the Treasurer acted under that section. The sale was not made under the 13 & 14 Vic. ch. 67, but in 1855, under the 16 Vic. ch. 182. The list relied on was no evidence of taxes having been imposed. The Treasurer said there was no assessment in his books against these lands; that the arrears were made up from the time of the patents issuing, that is, in this case, from 1821 up to the 1st of January, 1851, by charging 5s. 5d., by the statute, which was just the course taken in *Cotter v. Sutherland*—that is 3s. 4d. and 2s. 1d., the former sum being 1d. in the £ at a valuation of 4s. per acre, and the latter sum being the  $\frac{1}{8}$ th of a penny per acre—and which is objectionable : *Doe dem. Bell v. Reaumore*, 3 O. S. 243. It was necessary to prove that the taxes had been imposed by the Quarter Sessions while that Court had the power to assess : *Doe dem. Earl of Mountcashel v. Grover*, 4 U. C. R. 23; *Jarvis v. Brooke*, 11 U. C. R. 299. The list under the 13 & 14 Vic. ch. 67, it was said should not include non-resident lands, which these lands were. The taxes after the lapse of twenty years must be presumed to have been paid. The fraud charged against the defendant at the sale avoids the deed he got at law, as well as in equity : *In re Cameron*, 14 Grant 612; *Todd v. Werry*, 15 U. C. R. 614.

WILSON, J. delivered the judgment of the Court.

It will be better to consider first the charge of fraud which has been brought against the defendant in procuring the whole lots to be sold to him, and in procuring them at the prices they were given for, because if that part of the case should, in our opinion, be decided against the defendant, there will be no necessity for considering the other parts of the case.

The facts are, that at the sale on the 26th of December, 1855, the defendant bought 99 acres of 26 in the 6th concession for the arrears of taxes due on that lot, and 40 acres of 23 in the 7th concession for the arrears due on it, and he bought apparently the whole of the other lots for the taxes due on them.

He did not pay the amount of his purchases then; and as the Sheriff had notified the persons who bought that they had two or three weeks within which to pay, and if they did not pay by that time he would sell the lands not paid for over again, the lots in question were put up again for sale, and were bought in by the defendant. At this adjournment the sale was of whole lots, and not by the acre, as is usual and proper, and the defendant said to those present when the first lot he had before bid on was put up, according to the statement of the witness, "that he had a title to all those lots he had bid off at the first sale, and he wished those present to give way and let him perfect his title; and accordingly no one bid against him."

What claim the defendant had to the lots before that does not appear, though it was said by the witness "that the defendant's title to these lots came from one Lingham, who had failed."

The defendant thereupon became the purchaser of

	26 in 6th concession,	200	acres,	for	£9	10	7
	23 in 7th	"	200	"	"	17	14 6
	24 in 7th	"	200	"	"	17	14 6
	26 in 10th	"	200	"	"	17	14 6
W. part of	32 in 7th	"	100	"	"	4	2 9
	32 in 9th	"	146	"	"	13	6 3
			<hr/>				
In all			1046	acres for	£80	3	1

The defendant does not appear to have had any actual title to the land, none at any rate as against the plaintiffs.

Now upon these facts, having power to draw inferences of fact, I am of opinion the purchases made by defendant in the manner represented are not sustainable, because

they were procured by asking and inducing others not to bid against him.

The statement, too, that he made, that he had a title to these lots, and that he desired to perfect his title to them, is not shewn to be true, or if true it is not shewn how and in what manner it was true.

But although true it would not affect the principle which was violated by the defendant's proceeding, and which defeats the purchases that he made.

The conduct of the defendant, too, in avoiding his previous purchases of parcels only of the lots, and securing the whole lots, and the conduct of the Sheriff in permitting such a proceeding, and in selling the full lots without any attempt to discharge the taxes by the sale of a smaller number of acres than the whole lots, give also a very unfavorable color to the whole transaction.

The case of *Todd v. Werry*, 15 U. C. R. 614, is very similar to the present one, and is an express authority that a sale of this nature so conducted by the public officer, and so procured and effected by the purchaser, is void at law.

This case has been argued as if it came within the operation of the late Ontario Act : that the plaintiffs' action having been pending when that Act was passed, they are entitled to carry on the suit and recover their costs, if entitled thereto, in the same manner, as regards the costs, as if the act had not been passed.

It is contended that the defendant's purchases are protected by that act, because he had before the 1st of November, 1869, paid eight years taxes since the time of his purchase. Whether the 3rd sub-section of the 1st section does or does not exclude the defendant from the benefit of the act has not been raised by the parties ; they both submitted their case to be dealt with as regarded the costs only, and in settling the costs we have proceeded "in the same manner as if the act had not been passed:" that is, by holding the purchases to be void and fraudulent for the reasons before stated.

We are of opinion the 13 & 14 Vic. ch. 67, secs. 46

and 47, did not, nor did either of the sections, make the list of taxes which the Treasurer of the County was directed to prepare binding, *ex proprio vigore*, upon the persons and for the sums which that list contained.

The statute does not give the list such effect, and it is not to be presumed that persons or lands charged by no authority, but debited merely by the Treasurer in his books with the yearly sum of 5s. 5*d.* on each 200 acres of wild land, can be considered as having been ever legally taxed. And there is evidence that leads to the conclusion that that was the course adopted since the year 1839, at any rate.

If therefore the original charge was void, the mere fact that it was afterwards copied on to the Treasurer's list cannot have made it any better; it still remained an illegal charge—that is, no charge.

Probably also the advertisement might have been held objectionable, for not specifying in it whether the lands were patented or held under a lease or license of occupation, the fee of which still remained in the Crown. For in *Hall v. Hill*, 2 E. & A. 569, the Court determined that the warrant was void because it did not do so, and the 16 Vic. ch. 182, sec. 56, after requiring that the warrant shall distinguish such lands, enacts that, “the sheriff in the advertisements hereinbefore required shall similarly distinguish the lands patented from those the fee of which is in the Crown.”

It would be difficult after that [decision to hold that the warrant which did not so distinguish the lands was void, and that the advertisement, which was also in disregard of the statute in this respect, was not void.

No opinion is given on the alleged ground of fraud, for, according to the case of *Raynes v. Crowder*, 14 C. P. 111, the plaintiff may be obliged to go into Chancery for relief, if he still have the power to do so.

The other exceptions taken by the rule would not, we think, be entitled to prevail.

The rule will, therefore, be made absolute to enter the

verdict for the plaintiffs in the usual way, because they are entitled to carry on their proceedings and recover their costs, if entitled thereto, in the same manner as regards the costs as if the act had not been passed. And it will be for the defendant to procure the taxation of the plaintiffs' costs, and to pay them, in order to stay all further proceedings. The rule will be absolute to enter a verdict for the plaintiffs, with the costs of the application and costs of cause.

*Rule absolute.*

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MEMORANDA.

During this Term the following gentlemen were called to the Bar :—ALEXANDER GREY McMILLAN, ROBERT CHARLES SMITH, FREDERICK JOHN FRENCH, JOHN GEORGE HODGINS, CHARLES WALLACE BELL, WILLIAM FITZGERALD, ARCHIBALD FREDERICK CAMPBELL, DAVID JUNOR, WILLIAM WILSON HOLCROFT, JAMES WILLIAM SHARPE, JAMES WATKINS WELLINGTON WARD.

## MICHAELMAS TERM, 34 VICTORIA, 1870.

*(From November 21st, to December 10th, 1870.)**Present:*

THE HON. WILLIAM BUELL RICHARDS, C.J.

" " JOSEPH CURRAN MORRISON, J.

" " ADAM WILSON, J.

## HENDERSON V. HARRIS ET AL.

*Ejectment—Statute of Limitations—Entry.*

One G., owning land, allowed a school-house to be built upon it, in 1840, by the neighbours; and a school was kept there until 1851, when a new site was obtained, and the trustees sold the old house. Before doing so however they sent for G., to get his consent; and he came to the house, and said the purchaser might live in it until the land was cleared up around it. In ejectment against defendant claiming under the purchaser—

*Held*, that there was evidence of an entry by G., in 1851, from which time only possession would run; and that the plaintiff, therefore, was not barred.

EJECTMENT for the east half of lot 30, in the 11th concession of East Nissouri, in the county of Oxford. Writ issued on the 31st July, 1869.

Mary Harris appeared and defended for a part only of the premises, to wit, commencing at the south angle of lot 30, running thence northerly, along the easterly boundary of the lot, to the north side of the dwelling-house in which the defendant Mary Harris resided; thence westerly to the north-westerly limit of said house; thence southerly, parallel with the easterly limit of said lot, to the southerly limit thereof; thence easterly along the southerly limit of said lot to the place of beginning. John Harris did not appear, and judgment was signed against him.

The plaintiff claimed under a conveyance from Eleazer McCarty and wife; and defendant, besides denying the claimant's title, asserted title by length of possession in herself and one Jacob Harris, who was the assignee of one D. Sutherland, who was the assignee of the trustees of school section number eleven, of the township of East Nissouri, who were the grantees of William H. Gregory.

The cause was tried at Woodstock, at the Fall Assizes of 1869, before Wilson, J., without a jury.

It appeared that one Gregory owned the lot in question when the house, which was in dispute, was built. It was erected about twenty-nine years ago. Gregory gave the privilege of building a school-house on the lot, which was built by the neighbours. A school was kept in it for four or five years. In 1846 the school-house was occupied by the school trustees, and was kept as a school-house, until Sutherland bought it in 1851, in which year a new site had been bought for the school-house. The trustees sold the school-house for the benefit of the section, but not the land. They would not sell without Gregory's consent. He was sent for, and came to the place; and said that Sutherland, or any one else, might have the school-house until the land was cleared up round about, or if the land was not cleared up until it rotted down. He wanted the house moved off, but that could not be done; and Gregory said they could live in it until it wanted repairing. Sutherland bought the house, and the purchase money went into the school fund. Gregory said he would not sell the land. It was in conversation with the trustees the understanding with Gregory was had, and they sold the house on those terms.

Sutherland was called by the defendant, and said he went into possession in the fall of 1851; the house was sold at auction; Gregory advised him to purchase it; it was the house that was sold, and not the land; he did not buy the land nor sell it; Gregory was at the place at the time of the sale; the sale was of the school-house, and all parties were in it at the time of the sale, and he understood perfectly

that the land was not sold. Before selling to one German he offered it to Gregory, who declined to purchase. Sutherland said he got no legal title, but was to possess the house as long as Gregory saw fit.

German bought from Sutherland on the understanding that the house should stand as long as he or any other person he might sell it to wanted to use it. He bought seventeen or eighteen years ago. He said, in his evidence, that Gregory said, when he gave the school-site, that he would give a deed for it, but that his word was sufficient; and he would give it for a school-site as long as grass grew or water ran. Seventeen years ago he sold to Harris for his mother.

On this evidence the learned Judge found a verdict for the plaintiff. The note of his view of the case was as follows:—"I think, Gregory's consent being asked for the sale in 1851, there is evidence that he entered and gave it, and stipulated for the purchaser removing the building when the land should be cleared up: that it has been proved the land was cleared, and a demand of possession has since been made: that under the circumstances a fresh starting-point took place in 1851, and twenty years are not complete from that time. If this be not so, defendant is entitled to a verdict."

Leave was given to defendant's counsel to move to enter a verdict for her.

In Michaelmas Term, 1869, *Osler*, for defendant, obtained a rule, pursuant to leave reserved, to enter a nonsuit or a verdict for the defendant.

In Easter Term last, *Ferguson* shewed cause. The plaintiff entering on the premises, advising Sutherland to buy, and consenting that he should do so, is equivalent to the most formal entry: *Ball v. Cullimore*, 2 C. M. & R. 120.

*Osler*, contra. The school trustees could transfer the possession. It was no sufficient entry to give possession by merely coming on the place: Consol. Stat. U. C. ch. 88, sec. 11. Mere entry is not to be deemed a possession: *Allen v. England*, 3 F. & F. 49.

RICHARDS, C. J., delivered the judgment of the Court.

We think there was evidence to support the view taken by the learned Judge at the trial; and we think his decision right in law and in fact.

*Rule discharged.*

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MUNRO V. COX.

*Note payable to A. for the use of B.—Effect of.*

Declaration on a note payable to G. or order. Plea, *non fecit*. The note when produced was payable to G. or order "for the use of M." *Held*, no variance, for it was declared on according to its legal effect. There was also an equitable plea, setting out facts which if true shewed that M. was not entitled to the money, and alleging that the plaintiff, the endorsee of G., took it with notice. *Held*, that the fact of the note being expressed to be for the use of M. was no evidence of such notice; for this shewed only M.'s right as against G., whereas the plea was in denial of his right.

DECLARATION (the cause having been removed by *certiorari* from the Division Court) on a promissory note for \$80, made by defendant, on the 20th April, 1869, payable to J. B. Gordon, or order, and endorsed by him to the plaintiff.

Plea, on equitable grounds, that before the day of the date of the said promissory note one Matthew Darragh, by indenture of mortgage, conveyed to the Canada Landed Credit Company all and singular, &c., (describing the land), and also before the date of the said promissory note, and subsequently to the date of the said mortgage, the said M. D. conveyed by way of mortgage to one William Matthewson all his interest and equity of redemption in and out of the said lands; and default having been made in the payment by the said M. D. to the said Company of the moneys secured by the said first-mentioned mortgage, the said Company, before the day of the date of the said promissory note, under and by virtue of a power contained in the said first-mentioned indenture of mortgage, sold, and the defendant purchased, the said land, at and for the price or sum of \$1200; and that before the defendant had paid his said

purchase money, and at the time of making the promissory note hereinafter mentioned, one Frederick Armstrong, assuming to act for the said Company in this behalf, and the said J. B. Gordon assuming to act on the part of the said W. M., falsely represented to the said defendant that the sum due to the said Company from the said M. D. under the said first-mentioned mortgage amounted to \$1120, and that the said W.M. was entitled to claim from the said Company \$80, parcel of the said purchase money—that is to say, the difference between the amount so represented to be due to the said Company from the said W.M. and the said purchase money—and that in respect of the said sale and purchase the said Company was indebted to the said W. M. in the said sum of \$80; and the said Armstrong and the said Gordon then demanded of, and by means of such false representation as aforesaid induced and prevailed upon the defendant to make and deliver, and the defendant did then make and deliver to the said J. B. Gordon a promissory note for the sum of \$80, payable on the first day of November next after the date thereof to J. B. Gordon or order, for the use of the said W. M., which is the promissory note in the declaration mentioned, as and for the payment and discharge of the said sum of \$80 so alleged and represented to be due as aforesaid from the said Company to the said W. M. And the defendant says that in truth and fact no such sum of money, nor any money whatever was ever due and owing by the said Company to the said W. M., and that the said Company were entitled to claim and do claim the full amount of the said purchase money, to wit, the said sum of \$1200; and that except as aforesaid there never was any consideration for the making of the said note by the defendant—of all which the plaintiff had notice when the said note was first endorsed to him.

The cause was tried at the last Spring Assizes at Goderich, before Morrison, J.

The note was put in and admitted by defendant. It was payable "to the order of J. B. Gordon for Wm. Mathewson."

It was admitted that the note was endorsed to the plaintiff before it fell due, and that he had no notice of the matters set out in the plea, other than that which it was said was conveyed by the note itself, it being payable to the order of J. B. Gordon for William Mathewson; and that if the learned Judge were against the sufficiency of such notice the defence failed.

The learned Judge ruled against the sufficiency of the notice, and thought the defence on the equitable plea failed; and he directed a verdict for the plaintiff, the damages being assessed at \$87.44.

The defendant's counsel objected to the ruling.

In Easter Term last *Squier* obtained a rule calling on the plaintiff to shew cause why the verdict should not be set aside and a new trial had, because the learned Judge improperly rejected the evidence tendered at the trial to shew that the consideration for the making of the note had failed, and that the same had been given under the circumstances set out in the plea; and because he erroneously ruled that the trust appearing on the face of the note was not sufficient to let in evidence of the original transaction, and rejected the same.

In this Term *Robinson*, Q. C., shewed cause. The plaintiff is entitled to recover on the note, which is correctly set out according to its legal effect. *Sigourney v. Lloyd*, 8 B. & C. 622; S. C. in Error, 3 Y. & J. 220, is distinguishable, for there the defendants, who would answer to the plaintiff here, were parties to the misappropriation of the money. This case more resembles *Evans v. Cramlington* there cited, Carth. 5. The second plea was not proved, for notice to the plaintiff of the facts set out in it was not attempted to be supported otherwise than by the argument that the wording of the note was evidence of it, by expressing that it was payable to the order of Gordon for Mathewson. That shewed that Gordon was a trustee with power to deal with the note as he pleased for Mathewson, and it must be assumed he did so. The plaintiff was not obliged to see to the due application of the money by

Gordon, and it was not even shewn that Gordon had not duly applied it: Consol. Stat. U. C. ch. 90, sec. 7; *Leith R. P. Stats.* 84.

*Mackenzie*, Q. C., supported the rule. The note as it is is not negotiable, and as it reads it is notice to every one that Matthewson is the owner of the note, and alone entitled to the money: *Edie v. East India Company*, 2 Burr. 1227; *Snee v. Prescott*, Atk. 249; *Byles on Bills*, 98, 120, 121. The case of *Forman v. Wright*, 11 C. B. 481, is a direct authority in support of the sufficiency of the second plea.

WILSON, J., delivered the judgment of the Court.

The case of *Sigourney v. Lloyd*, 8 B. & C. 622, established that an endorsement on a bill of exchange "*Pay to Samuel Williams, Esq., of London, or his order, for my use*," had the effect "of preventing a subsequent transfer of the bill for the benefit of any other than the person for whose use it is expressed to have been made by the endorsement \* \* \* and of restraining the negotiability of the bill, or at least of making the first endorsee (if he takes the bill with those words on it, as Williams did in this case) a trustee for the original endorser. \* \* \* Such an endorsement will not prevent the endorsee from receiving the money from the acceptor when the bill becomes due. If he pay it to his principal all will be well, but the endorsee must look to him for the application of it."—Per Lord Tenterden, C. J. It was further said by Mr. Justice Bayley: "But when he introduces the words '*to my use*' on the bill itself, he notifies to the world that he, the party endorsing, has not given to the endorsee a general unlimited authority to apply it to his own purposes, but only to apply it to the use of him, the endorser. \* \* \* It is said, why introduce the words '*or order*'? The purposes of the endorser may, perhaps, have required that the bill should be endorsed. But before any person could honestly take that bill and advance money on it, he ought, seeing the words '*for my use*' on the bill, to have satisfied

himself, from the correspondence and state of the accounts between Sigourney and Williams, whether the latter was endorsing it for the benefit of Sigourney or for himself."

No doubt then Gordon could demand the money as trustee for Matthewson, or endorse it over for the like purpose, and his endorsement would, as a consequence, be restricted to that extent.

His endorsee would (apart from the Statute referred to in the argument) be bound to see that the money he gave to the endorser was applied by him for Matthewson. The endorsee could plainly not take it from the endorser on account of a purely private dealing between themselves, without regard to the interests of Matthewson.

The note, though restricted as to the application of the money to be paid upon it, is certainly negotiable. This plaintiff as endorsee is therefore entitled to sue in his own name.

The plea denying the making of the note puts in issue the fact of the signature being that of the defendant, and that he put it there with the intent of being bound by it as the maker of the note, and that the instrument set out is the one he signed in fact, and that it is according to its legal effect the same as the one declared on.

The only question which was or could have been raised upon this plea at the trial was whether the count which set out a note payable to the order of Gordon was supported by the production of a note payable to the order of Gordon *for William Matthewson*. And we think the note did maintain the count, and that there is no variance. The note is set out according to its legal effect.

The right of action and of transfer were both vested in Gordon. There is no plea asserting that Gordon endorsed the note in violation of the purpose for which he got it, or that the plaintiff did not pay Matthewson or see that Gordon paid him; or that there has been, or that there is intended to be any breach of trust of any kind towards him.

The case of *Evans v. Cramlington*, Carth. 5, 2 Vent. 307,

1 Show .4, and referred to in 8 B. & C. 627, and following pages, is not unlike the present case.

This disposes of the first plea.

The second plea sets up want of consideration, and notice thereof to the plaintiff before he took the note. Whether the special circumstances detailed in the plea are true or not, or were meant to be admitted or taken for true so far as the disposal of that issue is concerned, I cannot make out. All I know is that the finding of that issue one way or the other is made to depend upon whether the notice of such facts has or has not been sufficiently established by the information communicated by the note itself that it was made for *William Matthewson*.

The defendant may shew that Matthewson was not entitled to the money in question, and he does shew that if his plea be true. But does the fact of the note being payable to Gordon for Matthewson shew *that fact*? We think not. It would be and is notice to all persons of Matthewson's rights in, to, or under the note, as against or as respects Gordon and all claiming from him. But this plea is not in assertion of Matthewson's rights as against anybody; it is in denial of his rights and those of everybody else upon the note. And it is plain that a plea which denies his rights cannot be proved by the production of a note which on its face affirms and implies the very contrary, namely, that he has those rights which are impugned by the plea. The note is evidence only for the purpose of proving that the defendant did not give to Gordon a general unlimited authority to apply the note to his own purposes, but authority only to apply it to the use of Matthewson; and no issue has been raised upon that matter.

The rule must therefore be discharged.

*Rule discharged.*

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## WADSWORTH ET AL. V. MCDOUGALL.

*Artificial channel—Penning back water.*

The plaintiffs owned land on the River Humber on which there was a mill, the water from which flowed through *an artificial channel* of about 700 feet into the river. Defendant having built a dam by which the water was penned back in this channel, so as to obstruct the working of plaintiffs' mill and the natural flow of the stream:

*Held*, that the plaintiffs were clearly entitled to maintain an action therefor.

THE declaration alleged that the plaintiffs were possessed of certain land adjacent to the River Humber, and were also possessed of a certain mill erected on said land, and were entitled to have the water of the river flow by and away from the said land and mill; and that the defendant on divers days and times penned back the water of the river, and obstructed the same, so that it could not flow by and away from the said land and mill, whereby the water of the river overflowed and was penned back upon and over the said land, and against the said mill, and could not flow freely from the same, and remained so penned back for a long space of time, and injured the said land, and deprived the plaintiffs of the use of the said mill; and the plaintiffs have been put to great trouble and expence.

Defendant pleaded—1. Not guilty.

2. That the land was not the plaintiffs' as alleged.

The cause was tried before Wilson, J., without a jury, at the Toronto Winter Assizes for 1870, when a verdict was entered for the plaintiffs, with 1s. damages.

In Hilary Term last, *Tilt* obtained a rule *nisi* to set aside the verdict and enter a nonsuit, or a verdict for defendant, pursuant to leave reserved, the Court being at liberty to draw inferences of fact.

The evidence given on the part of the plaintiffs shewed that they were the owners of a mill built on part of lot 22, in concession C. in the Township of Etobicoke. The patent for the land was issued in the year 1854. The water from the mill flowed through an artificial channel

into the river about 700 feet. The channel was made before the purchase from the government, and the description in the grant of the part of the lot which the plaintiffs claimed went to the west side of the mill race, thence down the mill race to its confluence with the River Humber; thence following up the west edge of the river against the stream to the limit between lots 22 and 23. This gave all the land on 22, between the west side of the mill race and the river to the plaintiffs, so they were clearly raparian proprietors in respect of that land.

The evidence shewed that before the dam of the defendant was built, some six or seven years ago, there was no difficulty in using the plaintiffs' mill; the water flowed regularly and freely from it, and the ice was kept clear in winter; but since the erection of the defendant's dam the flow of the water had been impeded, so that the plaintiffs' mill could not at times work at all, and the ice formed in the mill race in consequence of the flow of the water having been impeded.

There was a dam built on the place now owned by defendant more than twenty years ago by one Rowland Burr. The plaintiffs complained of it and brought an action, and he took it down. Then another dam was erected about seventeen or eighteen years ago; that dam was down for about two years, and five or six years ago it was rebuilt. Last summer it was rebuilt and repaired, and raised three or four inches. The dam caused back water to within 130 feet of the plaintiffs' mill wheel.

The plaintiffs' miller said, when he came there seven years ago defendant's dam was not up; there is a great difference now; there was no back water then, but there is now; last summer defendant's dam was raised, and the back water was worse in the plaintiffs' mill than it had been before.

Another witness said he remembered when Mr. Dougall built the dam; when there was no dam below, and the plaintiffs' mill was not running, the race would be dry; the witness had seen it frequently when the mill was not

running. Since defendant's dam had been put up the water was backed up into the race a considerable way; the water when it could run off from the race would not freeze; now it was filled with ice all up, and there was no cause for this but the dam below. Persons who cleaned out the race in the fall of 1855 said it was perfectly dry then, and no water or mud. McDougall's dam was not then up.

Defendant was called, and said the dam did not cause the water to flow back into the tail race: that the race had been deepened. He said that seventeen years ago his dam was six inches clear of the tail race, but since then the race had been deepened more than eighteen inches; the back water had been caused by the deepening of the tail race, and not by the dam below; the water at his mill stands six feet head, just as it did seventeen years ago. On cross-examination he said, perhaps if the dam was taken down there would be no water in the tail race. He concluded, however, by saying the dam did not cause the flow of the water, it was the deepening of the race.

During Easter Term, *M. C. Cameron*, Q. C., shewed cause, and cited *Watson v. Perine*, 13 C. P. 229; *Mitchell v. Barry*, 26 U. C. R. 416.

*J. H. Cameron*, Q. C., contra. The injury is for backing the water through an artificial drain or water-course, and the question is whether the plaintiff can maintain this action therefor as a riparian proprietor.

RICHARDS, C. J., delivered the judgment of the Court.

The evidence shewed beyond a reasonable doubt that when there was no dam at the defendant's place where the present dam is, the water was not penned back into the plaintiffs' water-course to any injurious extent, and certainly not to the extent which is now shewn to exist.

Whether this effect is produced by the height of defendant's dam forming the barrier which raises the water to the height complained of, or whether, not being apparently of

sufficient height to do that, it really retards the flow of the stream so as to prevent the water discharging as fully and freely as it otherwise would, seems to be of little consequence, so long as the effect is to raise the water on the plaintiffs' land beyond what it would if defendant's dam were not there.

I do not understand that it was contended on the argument that the evidence did not shew that the dam caused the water to flow back on the plaintiffs' mill-race more than it would in the natural flow of the stream, but that, inasmuch as the mill-race was an artificial excavation, therefore the plaintiffs could not recover.

*Watson v. Perine*, 13 C. P. 229, is an express authority on that point. In the judgment of the learned Chief Justice he discusses the point, and considers the question of riparian rights had nothing to do with the plaintiff's claim any more than if the owner of land through which a stream passed were to pen it back so as to flood a cellar which drained into that stream, both cellar and drain of course being of artificial formation.

The other written judgment in the case puts it on the ground that the owner of the artificial excavation was also riparian proprietor of a small piece of the land adjoining the water-course, the natural flow of which was obstructed by the dam of the defendant, the substantial injury being to his mill, as in this case.

In both views that case sustains the plaintiffs' action here, and this rule must be discharged.

*Rule discharged.*

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## BROWN V. THE CORPORATION OF THE TOWN OF BELLEVILLE.

*Corporation—Contract not under seal—Liability.*

The defendants wished to dredge their harbour, and the plaintiff had a dredge, then in the State of New York, which, after negotiations with the chairman of the committee on harbour and town property, he offered to lend to the corporation on certain terms, one of which was that the corporation should pay the cost of its transport to Belleville. The committee reported and recommended this offer to the council, and it was adopted, and the chairman then told the plaintiff to bring the dredge to Belleville, which he did, at a cost of \$373. The committee afterwards decided to let out the dredging by contract to another person. *Held*, that the corporation were liable to the plaintiff for the cost of bringing the dredge, although there was no contract under seal.

DECLARATION. First count, on an agreement that if the plaintiff would bring to the town of Belleville, from Broome county, in the State of New York, a certain dredging machine which the plaintiff had there, to be used by the defendants in the work of dredging the harbour within the limits of the town of Belleville, which dredging was about to be undertaken by the defendants, and in consideration that the plaintiff would allow the said machine to be used in the work of dredging the said harbour, the defendants agreed to pay the plaintiff all expenses incurred in the transportation of the machine from Broome County to Belleville, and to keep the same in good repair, and to return the same in as good order as the defendants received it, and to pay the plaintiff for the use of the said machine by the defendants ten per cent. per annum upon the sum which the plaintiff had paid for the machine. And the plaintiff alleged that, relying on the promise of defendants, he caused the machine to be transported from Broome county to Belleville, and placed the same upon wharves in the said harbour, of all which the defendants then had notice. Yet the defendants, in violation of their agreement in that behalf, refused to receive the said machine, although requested so to do, and refused to employ the same in the work of dredging the said harbour, but, on the contrary, employed another dredging machine for the said work, and refused to pay the plaintiff the expenses, costs, and charges, in transport-

ing the said machine to Belleville, whereby the plaintiff has suffered great loss and damage.

Common counts were added, for work and materials, &c. Defendants pleaded, to the first count :—

1. That they did not agree as alleged.
2. That the plaintiff did not bring the machine to the town of Belleville as alleged.

And to the second count, never indebted.

The cause was tried at the Spring Assizes for 1870, at Belleville, before Gwynne, J.

The evidence shewed that, in 1868, A. Diamond, Esq., was appointed chairman of the committee on harbour and town property. Under the by-law to regulate proceedings and establish rules of order in the town council, by the 41st clause, committees appointed were to report on any subject referred to them by the council a statement of the facts, and also their opinion thereon, in writing. and it should be the duty of the chairman to sign the report and bring up the same.

By sec. 53, no money appropriation should be finally entered upon by the council until it should be referred to the standing committee on finance and assessment, and no money should be paid nor any expenditure be authorized by any member of the council, without a resolution of the council ordering the same and specifying the amount.

During the early part of the summer of 1858, apprehensions were felt that steamers and other vessels would not be able to get into the harbour in consequence of the filling up of the same with saw-dust, and the committee on harbour and town property had communications with the plaintiff on the subject, and a plan was discussed between the chairman of the committee, Mr. Diamond, and Mr. Brown, by which they expected to clean out the harbour. On the 6th of May, 1868, a report was made to the council, which, after reciting their inability to induce the government to aid them, stated they had put themselves in communication with Alexander Brown, Esq., of Belleville, who owned a dredge in every way suitable for the purpose, as the

committee were advised, which was then in the State of New York, and which Mr. Brown had consented to loan to the corporation to use for dredging the harbour, and also to build a scow to receive the dredge when it arrived, on condition that the corporation would pay the cost of transport to Belleville, and pay him for the use of the dredge a sum not exceeding ten per cent. per annum on the actual cash value of the dredge and the scow whilst the same were employed by the corporation. \* \* \* The corporation to keep the machinery in good order, and to return the dredge in good condition, ordinary wear and tear alone excepted. The agreement to be subject to a vote of the people to raise funds for dredging the harbour, and all expenses connected therewith.

The committee considered the offer a very favorable one, and recommended the same for acceptance by the council.

The report of the committee was presented to the council and adopted. The clerk of the council said the usual practice was for the report to be read in council after it was presented by the chairman; then a motion was made for its reception, and, that being carried, a motion for its adoption was made. If adopted, it was customary for the council to proceed on the report without any further resolution of the council. If a report were made requiring a specific sum of money, it would go into a committee of ways and means. The invariable practice was, when a report was adopted by resolution of the council, the committee having charge of the matter reported upon proceeded with it.

After the adoption of the report, Mr. Diamond, the chairman, saw the plaintiff and concluded the arrangement with him, and told him to bring the dredge. The chairman had some difficulty in then getting him to consent to do so, in consequence of his having taken offence at something said in the council. The amendment to the report, that the agreement was to be subject to the vote of the people to raise funds for dredging the harbour, having been made in council, Mr. Diamond called the plaintiff's

attention to it, and the risk he ran of the by-law passing. He assured him he thought it would pass. Thereupon the plaintiff sent for the dredge, and had it brought to Belleville. The expense of bringing it, \$373.50, was the amount of the verdict.

On the 17th of June, the harbour committee again reported that they had had under consideration the cheapest and best mode of carrying out the work of dredging the harbour, and had consulted persons of experience, and heard recommendations as to the propriety of letting the same out by contract at so much a cubic yard, or at a round sum for the whole work. The committee were not prepared to recommend the conclusion of any negotiations until the by-law for raising the money for the work was confirmed and finally passed.

At this time the by-law, which was passed on the 15th July, had been advertised, but not passed.

The preamble of the by-law stated that the council had resolved to erect and put in efficient repair the bridges in the town, and also to dredge or deepen the harbour, and it had been ascertained that the same would require an expenditure of \$12,000, *i.e.*, \$6,000 for bridges, and \$6,000 for the harbour; and it was deemed advisable to borrow the same on the credit of the town for a period of 20 years, and to issue debentures for the same. Then followed the clauses authorizing the borrowing of the money, &c. The votes of the electors were to be taken on it on Monday, 6th July, and it was passed by the council on the 15th July.

On the same day the harbour committee reported that they had unanimously decided that it was desirable that the work of dredging the harbour should be let out by contract at a certain sum per cubic yard, measured on the scow after the same had been excavated, the work to be executed as the committee might from time to time direct, duly reporting to the council as the work progressed. The committee desired to be authorized to advertise for tenders for the work, requiring those who tendered to state at

what price per cubic yard they would perform such work, providing the dredge, scow, and all necessary apparatus, and also requiring the parties tendering to state at what time they would be enabled to commence operations in case the tender should be accepted. This report was also adopted by the council.

The committee in the meantime had seen a plan of a dredge which it was thought would be better for working in saw dust than the plaintiff's, and they finally decided to let the contract for dredging the harbour to Mr. Hayden, who used the new style of dredge, and a contract, under the seal of the corporation, was entered into with Hayden. In the meantime the plaintiff's dredge had been brought to Belleville, at an expense of over \$300, and was not then required for the use of the corporation. There was evidence given to shew that the corporation had recognized the contracts of the committee after their reports had been made, and paid for the work done in the same way that this was, though there was no written agreement or contract under seal: that sidewalks, involving a large expenditure, had been constructed in this way, and a bridge also built for the corporation, though there was no contract under seal.

Another by-law was passed in December, but that was to remedy some technical defects in the former one, and seemed to be of no particular importance as far as the matters in question in this suit were concerned.

The plaintiff had a verdict for \$373.50, with leave reserved to the defendants to move to enter a nonsuit.

In Easter Term last, *Flint*, for defendants, obtained a rule *nisi* to enter a nonsuit or verdict for defendants, pursuant to leave reserved, on the following grounds:—

1. That the agreement mentioned in the report of the 6th May, 1868, was to be subject to a vote of the people to raise funds for dredging the harbour, and all expenses connected therewith, which never having been done under that report, there was no concluded agreement with the plaintiff.

2. That on the 15th July, 1868, the council adopted a report breaking off the negotiations with the plaintiff, the same day that the vote was taken on the by-law.

3. That the plaintiff had no right to act until the vote was taken and the by-law passed.

4. That by the report of the 6th May, 1868, the agreement was to be subject to a vote of the people, and the agreement of the plaintiff could not have been concluded, from the terms of the report, until the vote had been taken, and on the same day the vote was taken the agreement was rescinded.

5. The agreement under which the plaintiff sues is not under the seal of the corporation, and is not binding on them.

6. That the by-law passed on the 15th July, 1868, was bad, and no other by-law to carry out the terms of the report of the 6th May, 1868, was passed until the 7th December, whereas the agreement with the plaintiff was rescinded on the 18th July, 1868, before the by-law of December, 1868, and yet all the expenses were incurred, and dredge brought, in May, 1868, before the time allowed by the report of 6th May, 1868.

*John Bell*, Q.C., of Belleville, shewed cause. The matter done or to be done under the agreement was within the power of the corporation to do, and being reduced to writing in the shape of a report adopted by the council, the agreement was binding on the corporation to the extent that it was performed by the plaintiff: *Perry v. The Corporation of Ottawa*, 23 U. C. R. 391.

*Flint*, contra. The evidence shews that the engagement to bring over the dredge was made in the middle of April, whilst the report was not made until the 6th May, and is then to be subject to a vote of the ratepayers. The next report of the committee was on the 17th of June, and the by-law passed on the 15th July was bad, and the only operative by-law was that passed in December, long after the bargain was made: *Wingate v. The Enniskillen Oil Refining Co.*, 14 C.P. 380; *McLean v. Corporation of Brantford*, 16 U. C. R. 347; *Nicholson v. Guardians of Bradfield*

*Union*, L. R. 1 Q. B. 620; *Add. Con.* 700; *Calvin v. Provincial Ins. Co.*, 20 C. P. 21, 267; *Mayor of Ludlow v. Charlton*, 6 M. & W. 815; *Arnold v. Mayor of Poole*, 4 M. & G. 860; *Diggle v. London and Blackwall Railway Co.*, 5 Ex. 442; *London Dock Co. v. Sinnott*, 27 L. J. Q. B. 129. Here the defendants received nothing from the plaintiff. He merely brought his own property from the United States to Canada at his own expense. As far as he is concerned, no part of it comes within the rule laid down in L. R. 1 Q. B. 620.

RICHARDS, C. J., delivered the judgment of the Court.

It is not suggested that it was not within the scope and authority of the defendants as a corporation to enter into an agreement of the kind which the plaintiff contends was made with him. The only ground urged is, that they did not execute the agreement under their seal, and, being a corporation, are not bound by it.

The Courts in England, from time to time, have been inclined to hold that when the contract is within the scope and powers of the corporation it is good, though not under seal. Many of the cases are in relation to trading corporations and their contracts, and in one of the recent decisions Chief Justice Cockburn speaks of the rule requiring the corporation to execute contracts under seal as "a relic of barbarous antiquity." (*a*)

Though many of the cases arise out of contracts with trading corporations, they are not all so. But as to other corporations, when they have received the benefit of the agreement which has been executed, the Courts have held them bound by it to the extent of paying for that which has been performed. Most of the cases are referred to in *Nicholson v. The Guardians of the Bradfield Union*, L. R. 1 Q. B. 620; *South of Ireland Colliery Co. v. Waddle*, L. R. 3 C. P. 463; S. C. in Ex. Ch., L. R. 4 C. P. 617.

In *Pim v. The Municipal Council of Ontario*, 9 C. P. 304, the Court of Appeals in this country, ten years ago, in relation to municipal corporations, carried the law as far

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(*a*) *South of Ireland Colliery Co. v. Waddle*, L. R. 4 C. P. 618.

if not farther than it has gone in England in relation to the liability of similar bodies there on contracts not under seal.

*Perry v. The Corporation of Ottawa*, 23 U. C. R. 391, seems to me to be a strong authority in favor of the plaintiff. There a committee of the corporation was authorized to treat with and recommend to the council an engineer for making surveys, &c., for supplying the city with water, and making application to the government for the site of a reservoir. The chairman of the committee employed the plaintiff to make plans, which the Commissioner of Public Works required to see, and one of the committee wrote to the plaintiff to come to Quebec to assist in pressing the application for a site, which he did; the chairman also told him to go; and the report of the proceedings was approved by the Council. The Court held the plaintiff entitled to recover.

Here the Harbour Committee had been apparently specially charged with looking after the harbour, and endeavouring to obtain a dredge to clean it out, and devising other means to get rid of the saw-dust that was filling it up. The expense attending these other proceedings appear to have been paid by defendants without question.

Having failed to obtain a dredge from the Board of Works, or any other material aid from the government, they wisely concluded they had better help themselves. Learning that the plaintiff was the owner of a dredge which was then in the United States, the committee persuaded him to offer to send for it, and to let them have it on certain terms; the first stipulation in the agreement being, that he shall send for the dredge and bring it to Belleville, doubtless that there may be no delay in the matter. The evidence shews that the committee were under the impression that it would be for the interest of the town to have the dredging done before the water in the river was low, or the current slackened. The committee report the offer to the council, say they consider it very favourable, and recommend the same for acceptance by the council. The council adopt the report of the com-

mittee, and the chairman informs the plaintiff of it, and persuades him to send for the dredge at once, which he does, and expends money to the extent of over \$300 in bringing it to Belleville.

In the meantime the committee think a more favourable arrangement can be made for the interest of the town, and after the arrival of the dredge advertise for proposals to do the dredging, the contractor furnishing the dredge and all the implements, &c. They do not carry out the arrangement to use the plaintiff's dredge, and finally decline paying him the money he has expended in good faith in carrying out the arrangement he entered into with their express approval.

The agreement was to be subject to a vote of the people to raise the funds, if that would make any difference, and that vote was obtained long before this action was brought.

There may be some nice distinctions drawn between this case and some of the decided cases, but we think the law now has gone so far that when a contract has been entered into by the express direction of the corporation, and has been performed by the party, and the corporation has received the advantage of it, the corporation cannot set up as a defence that the contract was not under seal, always assuming, of course, that what was contracted for was a matter within the scope and powers of the corporation to contract for.

Now here the plaintiff did bring his dredge to Belleville to be used by the defendants. It is highly probable that the bringing of it was of real advantage to the defendants. The article is an expensive one to construct and there are not many of them in use, and in seeking offers for the work they required done, the fact that there was a dredge in the town, the use of which could be had for the work, would be likely to induce more favourable offers than if it had not been there. The corporation having received the advantage of the expenditure made by the plaintiff at their express request, ought not, according to the modern rule which has been laid down in the decided cases, to be

allowed now to set up the want of the seal to relieve them from repaying the money which the plaintiff spent in good faith at their request, in accordance with his agreement, from which they have apparently derived benefit.

We think the rule should be discharged.

*Rule discharged.*

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### OWENS V. THE QUEBEC BANK.

*Bankers—Deposit of check with—Presentment—Dishonor—Liability.*

The plaintiff having a bank account with defendants' agency at St. Catharines, deposited with them on Saturday morning, about 11.30, a cheque of one C. on another bank, in the same place, for \$350, payable to the plaintiff or bearer, and not endorsed. The sum was credited in the plaintiff's pass book as cash, and the cheque stamped with a stamp used by defendants as "The property of the Quebec Bank, St. Catharines." On Monday morning it was presented for payment and dishonoured; but it would have been paid if presented on Saturday before the bank closed, which was about one o'clock. The defendants having charged the amount of the cheque to the plaintiff, he sued them for money had and received and money lent.

*Held*, that he could not recover, for defendants were not guilty of laches; and *semble*, that they could have recovered back the amount from the plaintiff, even if they had paid it to him.

DECLARATION for money had and received, money lent, money paid, and interest.

Plea, never indebted.

The cause was tried at the last Spring Assizes for the County of Lincoln, before Wilson, J., without a jury.

The facts appeared to be that the plaintiff kept a bank account with defendants, commencing about two years before the transaction out of which the dispute arose took place.

On Saturday, 25th September, about half-past eleven, a. m., the plaintiff sent to deposit with defendants \$13 in bank notes, and one John D. Culver's cheque on the Niagara District Bank, at St. Catharines, payable to the plaintiff, or bearer, for \$350.

The deposit ticket was put in. It commenced: "Quebec

Bank, St. Catharines, September 25th, 1869.—Deposit to the credit of P. B. Owens, the sum of

$$11 \times 1 = \$ 11$$

$$1 \times 2 = \$ 2$$

Then other blanks for  
bills of larger amounts,  
such as \$4, \$5, \$10, &c.

*The initials of  
the clerk.*

Cheque

---

\$13

350

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\$363

The bank pass book was sent at the same time with the deposit, and was brought back shortly after, with the entry opposite the 25th September, "cash, \$363."

The cheque itself was stamped by the officer of the bank with a stamp which they used "The Property of the Quebec Bank, St. Catharines." It was presented at the office of the Niagara District Bank, which was in the same town with the agency of defendants' bank where the plaintiff kept his account, on Monday morning, the 27th, and was dishonoured, of which notice was given to the plaintiff.

If the cheque had been presented at any time on Saturday before the bank closed, which was about one o'clock, it would have been paid. The plaintiff said the cheque was deposited as cash, not for collection. In concluding his evidence he said he had a running account with defendants, and deposited the cheque with them.

There was evidence given that it was not usual amongst other bank agencies and offices to take cheques unless marked good by the officer of the bank on which they were drawn, and if any officer of the bank did so he would become personally liable.

On Monday, after the cheque had been refused payment, defendants' agent took it to the plaintiff and offered it to him, and wished him to sign a cheque for \$350, the amount of it. This he declined to do, and that amount was charged to him in account on Monday, to cover the dishonoured cheque.

The defendants' agent was called, and stated that he received the cheque in good faith, supposing it would be paid on Monday by the Niagara District Bank. He said he stamped with the stamp referred to any paper that came into his hands for defendants: that he had no instructions as to taking cheques that were unmarked: that he never asked any one to indorse a cheque payable to bearer: that he did not require a cheque drawn by one whose insolvency might be doubted to be accepted by the bank on which it was drawn, if deposited by a customer whose solvency was undoubted; if he considered the depositor doubtful, he might carry it to his credit before acceptance, but would not allow him to draw against it without its first being accepted. He never remembered asking a person to endorse a cheque payable to bearer, if the drawer was doubtful and the customer good, and the cheque left on deposit. He said if the plaintiff had drawn a cheque five minutes after he had deposited the cheque he would have paid it, or if he had asked him for cash on the cheque on the 25th, he would have cashed it. He might not have done it for a stranger, but the plaintiff was good and was a customer.

A verdict was rendered for the defendants, with leave to the plaintiff to move to enter a verdict for him, if the Court should be of opinion that he was entitled to recover on the evidence.

During this term *Harrison*, Q. C., obtained a rule *nisi*, pursuant to leave reserved, to enter a verdict for the plaintiff for \$350.

*James Miller* shewed cause. The cheque was dishonored and the plaintiff had notice of it. It was presented in due time, and even if the plaintiff had actually received the money on the cheque, he would have been liable to have been sued for money had and received to recover it back: *Timmings v. Gibbins*, 18 Q. B. 722; *Woodland v. Fear*, 7 E. & B. 519; *Jones v. The Bank of Montreal*, 29 U. C. R. 448; *Giles v. Perkins*, 9 East 12.

*Harrison, Q. C., contra.* Was the cheque received as cash? It was not "entered short" in defendants' books, as it is called, as mentioned in *Giles v. Perkins*, 9 East 12, but was credited as cash, and marked as defendants' property, and was not indorsed by the plaintiff. It was also entered in the plaintiff's pass book as cash. If defendants' agent had refused to take the cheque as cash, the plaintiff could have sent to the Niagara District Bank and got the money. If it had been paid over to an individual who received it as cash, he would have been obliged to bear the loss: *Geohagan v. Lawson*, 13 U. C. R. 495; *Redpath v. Kolfage*, 16 U. C. R. 433; *Smith v. Buchan*, 27 U. C. R. 106. If the cheque became the property of the defendants, as the evidence will warrant us in assuming, then they must bear the loss. If only taken to collect, they should not have marked it as their own, and should have presented it in due time, which they did not do. They should have presented it the same day, in which there was ample time. In England there is a custom established, but here there is none, and the defendants were guilty of laches: *Ex parte Pease*, 1 Rose 240; *Ex parte the Wakefield Bank*, *Ib.* 243, 250; *Thompson v. Giles*, 2 B. & C. 422; *Ex parte Oursell, Re Julians*, Ambler 297; *Ex parte Roberts*, 2 Cox Ch. Cas. 171; *Collins v. Martin*, 1 B. & P. 648; *Bolton v. Puller*, *Ib.* 539; *Ex parte Dumas*, 1 Atk. 232; *Rickford v. Ridge*, 2 Camp. 537; *Hare v. Henty*, 10 C. B. N. S. 65.

RICHARDS, C. J., delivered the judgment of the Court.

First, as to the laches of defendants in not presenting the cheque in due time. The law on the subject of presentment is laid down in *Byles on Bills*, 9th ed., p. 19, that it must be a reasonable time. "The result of the cases," says Tindal, C.J., 'from *Rickford v. Ridge* to *Boddington v. Schlenker*, is, that the party receiving a cheque has till the following day to present it, where there are the ordinary means of doing so.' Formerly it was held that the cheque must be presented on the *morning* of the next day; it is now, however, firmly established that the

holder has the whole of the banking hours of the next day within which to present it." At page 202 it is laid down: "A man taking a bill or note payable on demand, or a cheque, is not bound, laying aside all other business, to present or transmit it for payment the very first opportunity. It has long since been decided, in numerous cases, that, though the party by whom the bill or note is to be paid live in the same place, it is not necessary to present the instrument for payment till the morning next after the day on which it was received. And later cases have established that the holder of a cheque has the whole of the banking hours of the next day within which to present it for payment."

*Moule v. Brown*, 4 Bing. N. C. 266, is the case where Tindal, C. J., sums up the law. The facts of that case may well be referred to as shewing what view we ought to take of this. There the plaintiff declared on a banker's cheque for £27, drawn by one Fry on Moger & Co., bankers in Bath, payable to bearer, delivered by Fry to the defendant, and by the defendant transferred to the Banking Company of which the plaintiff was the public officer. Averment, that Moger & Co. did not pay the cheque, though duly presented, whereof defendant had notice. The second and fourth pleas alleged that the cheque was not duly presented to Moger & Co. for payment. The facts were, that the Banking Company's chief office was at Melksham, and they had a branch office at Malmesbury, about eighteen miles from Melksham, which is twelve miles from Bath. On Tuesday, 28th March, defendant having received the cheque from Fry in payment of goods, obtained cash for it at the Malmesbury office of the bank, though he was not a customer of the bank. By that office it was remitted on the *same day* to the head office at Melksham. From that office it was despatched on Thursday, the 30th, by a private hand, and was not presented to Moger & Co. at Bath until Friday, 31st March, when it was dishonored. The defendant received notice of dishonor on Saturday. The jury found for the plaintiff, but the Court held, as

the cheque if it had been properly sent by post could have been presented on Thursday, the plaintiff could not succeed, because the cheque had not been presented in the proper time. No objection was made that the action would not lie because defendant had not indorsed the cheque, or that the plaintiff made it his own by advancing defendant the money on it when he had not indorsed it.

The case of *Rickford et al. v. Ridge*, 2 Camp. 537, was an action brought by the plaintiffs to recover back money paid to defendant under the following circumstances: The plaintiffs were bankers at Aylesbury. At noon, on the 13th of June, the defendant asked them to cash for him a cheque, dated the 11th of the month, drawn by Mingay & Co., salesmen in Smithfield, on Smith, Payne & Co., bankers in the City of London. The plaintiffs gave him county notes for the amount, which were duly paid. The cheque was sent to London, and arrived there on the 14th. It was presented for payment on the morning of the 15th, when the answer was: "No effects; must see the drawers." The drawers of the cheque paid at their own counter till 4 p.m. on the 15th, but no application was made to them to pay that cheque. Notice of dishonor was given to defendant on the 16th. It was objected that the cheque had not been presented in time. Lord Ellenborough said: "The holder of a cheque is not bound to give notice of its dishonor to the drawer, for the purpose of charging the person from whom he received it. He does enough if he presents it with due diligence to the bankers on whom it is drawn, and gives due notice of dishonor to those only against whom he seeks his remedy." No objection was made that the plaintiff could not recover because the cheque had not been indorsed, and that the amount could only be recovered because of the endorsement.

No doubt the reason why the cheques in most of these instances were not indorsed to the plaintiffs was, because, under the Stamp Act, if they had been indorsed they would cease to be exempt from the tax imposed on bills of exchange.

In the case in the Exchequer of *Bellamy v. Marjoribanks*, on the subject of crossed cheques, 7 Ex. 389, Baron Parke, in giving judgment, at p. 400, in reference to that usage, said: "It cannot well be supposed that the usage is to be considered as equivalent to a direction by the holder or drawer to the drawee not to pay to the bearer, but to a particular person only; for then the cheque would be altered in a manner which would take it out of the exemption of the Stamp Act 55 Geo. III., ch. 184, schedule, part 1, which applies to cheques payable to bearer only; and the bankers to whom it was addressed would not be bound to pay to the person named."

*Timmins and wife v. Gibbins*, 18 Q. B. 722, was an action for money had and received by the Birmingham Bank for the use of the plaintiff. On the 26th of June, 1851, the female plaintiff while sole deposited with the Dudley branch for the use of the bank £80, £65 of which consisted of the notes of a bank at Stourbridge, five miles from Dudley. The notes were made payable either at Stourbridge, or at Messrs. Glyns', London. The agent of the Banking Company at Dudley gave a receipt, "Received of Mary Weal £80, for which we are accountable. For the directors and proprietors of the Birmingham Banking Company, (Signed) R. H. Smith, manager." "£80, at £3 per cent. interest, with fourteen days' notice."

The Stourbridge notes were sent by the evening post of the 26th June, to London, and presented on the 27th at Messrs. Glyns. Payment was refused. The Company received them back on the 28th, and on that day sent notice of dishonor to the plaintiff. The Stourbridge Bank paid up to the close of banking hours on the 26th June, but did not open afterwards. On the 13th January, the plaintiff gave fourteen days' notice of withdrawal, when the Company tendered the notes, which were refused. After demand, the plaintiff sued for money lent, money had and received, and on account stated.

In argument it was urged, "Here the notes were simply deposited with or received by the Company as and for

cash, the Company agreeing to pay the amount at fourteen days' notice." Wightman, J., said: "Can the plaintiff sue for money had and received? Payment of the notes having been refused, the Company would be entitled to answer that they had not received any money."

Lord Campbell said: "I am of opinion that the plaintiffs are not entitled to bring an action either for money lent or for money had and received. No doubt, at the time of the deposit, both parties believed that the Stourbridge Bank was solvent, and that these notes were valuable securities. It turned out, however, that they were worthless. No laches can be imputed to the Company, for they sent the notes to London immediately on receiving them, and gave notice of their dishonour immediately upon receiving such notice themselves. The case is the same as if the Stourbridge Bank had been insolvent long before the day on which the notes were deposited, and neither party had been aware of it. There are no grounds which will support a count either for money lent or money had and received, because there is a failure of the consideration upon which the defendants' promise would be founded. It was argued that the transaction amounted to a purchase of the notes by the Company. But it is impossible to give it that character; it was a deposit, made on the understanding that the amount should be repaid upon fourteen days' notice. \* \* \* If, as I suggested in the course of the argument, a person obtains in good faith change for a cheque which turns out to be worthless, the loss must fall on him."

Coleridge, J., said, amongst other things: "They (the plaintiffs) must, on whichever count they rely, shew that money was received by the Company from the female plaintiff. *Primâ facie* the receipt shews that; but the defendant is at liberty to prove it was given under a mistake of fact."

The doctrines here laid down go far to sustain the defendants' contention in this case. There is no fraud or laches on either side. The plaintiff deposited with the defendants certain security (the cheque in question) which

was assumed by both parties at the time to be worth \$350, and for the amount of which credit was given to the plaintiff in defendants' books. It turned out this security was worth nothing, but that was through no fault of the defendants.

We see nothing in this case to warrant the view, suggested also in *Timmings v. Gibbins*, that the transaction amounted to a purchase of the cheque by the defendants. The reasonable and natural view to take of the matter is, that the plaintiff, being a customer of the bank, sent this cheque in the usual course of his business to be passed to his credit in account, all parties at the time believing it to be good. If the defendants had been guilty of any laches they would probably have made it their own; but not being guilty of any neglect or omission, how can they be said to have received any money from the plaintiff?

*Woodland, Public Officer of Stuckey's Banking Company, v. Fear*, 7 E. & B. 519, was an action by the officer of a Banking Company for money had and received. The facts were, that one Helyar kept an account with the Banking Company's office at Glastonbury, and owed the defendant £39, and paid him, on the 17th of the month, a cheque for that amount on the Glastonbury establishment. The defendant, being at the time of receiving it in the neighbourhood of Bridgewater, presented it to the Company's office there on the same day. He was known to the officers there, and they gave him cash for it. The cheque was sent by the first post to the Glastonbury establishment, where it was delivered in the course of the 18th. On the morning of that day, Helyar had a balance there in his favour of £21, which had been drawn out before the cheque arrived, and the cheque was accordingly refused payment. Lord Campbell said, if the transaction could be considered a sale of the cheque outright, which, however was not contended, the doctrine of *caveat emptor* might have applied in the absence of fraud. He then proceeded to argue that the plaintiff having separate offices, and the drawer of the cheque keeping his account at one

establishment, and drawing the cheque on that, as to the other branches was to be considered as banking with the Glastonbury establishment alone. If, then, Helyar had no authority to draw so as to enforce payment, he adds: "we think the Bridgewater branch cannot be properly considered to have paid the cheque as his bankers, or on his credit; and if so they must have paid it on the credit of the defendant, as much as if they had given him change for a bank note, both parties believing it to be genuine; in which case, if it turned out to be forged and worthless, an action might clearly be maintained to recover back the money advanced."

The dictum of Lord Ellenborough in *Rickford v. Ridge* was upheld in the very elaborately argued case of *Hare v. Henty*, 10 C. B. N. S. 88.

The same doctrine was in effect affirmed in *Firth v. Brooks*, in the Queen's Bench, reported in 4 L. T. Rep. N. S. 467, and in the American edition of 1 B. & S. 981.

Mr. Harrison mentioned in his argument that there was a custom in London about not presenting cheques until next day. Lord Ellenborough, in the case in 2 Camp. 537, says the case must be decided by the law merchant. "It is always to be considered whether, under the circumstances of the case, the cheque has been presented with reasonable diligence. This is what the law merchant requires."

Whenever a custom has become general, then it becomes a part of the law merchant, and the Court is supposed to know what that is.

We think, therefore, the plaintiff's action fails on several grounds. First, no money was actually had and received by defendants for the plaintiff, nor was any paid to them by him in relation to this transaction.

The facts do not shew a purchase of the cheque by the defendants, and a paying for it, so as to raise the question of *caveat emptor* between them, but, on the contrary, a deposit of this cheque by the plaintiff, in the course of his business, with the defendants, his bankers, who passed the

amount to his credit. The cheque was afterwards duly presented, and dishonoured, and notice of dishonour given to the plaintiff, and the cheque offered to be returned to him. As the defendants were guilty of no laches, the loss cannot fall on them.

Though the passing the amount to the credit of the plaintiff in defendants' books, and marking the cheque with the stamp of the bank, might be *prima facie* evidence (though I doubt it) of the purchase of the cheque by the defendants, yet when the whole of the facts are brought out no such presumption can reasonably arise under the facts of this case. The authorities referred to seem to go the length of shewing that if the plaintiff had actually received the amount of the cheque at the counter of the bank when it was deposited, the defendants could have recovered it back from him.

We think the rule should be discharged.

*Rule discharged.*

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### BROWN V. LAMONT.

*Charter party—Vessel to proceed with all convenient speed—Construction.*

Where the plaintiff agreed that his vessel should with all convenient speed sail from Kingston to Dresden or Chatham, to take in a cargo of wheat for Kingston, and she took twenty-seven days to reach Detroit, but the delay arose from no fault of the captain or crew:

*Held*, that he had fulfilled his contract, and that the defendant was not justified in refusing to load her.

ACTION against defendant on an agreement that the plaintiff's barque "Southampton" should, with all convenient speed, sail from Kingston to the ports of Dresden or Chatham, and to Detroit, and that the defendant should load her with grain for Kingston, for which defendant agreed to pay a certain rate per bushel as freight.

The statement of the contract was varied in the second count, and the third count was the common count for hire of the vessel.

Defendant pleaded to the first and second counts, 1. *Non assumpsit*; 2. That the agreement was subject to a condition that the vessel should arrive at Dresden or Chatham in time to receive her cargo, and carry it to Kingston before the season of 1869 closed, which was not done; 3. That it was a condition that the vessel should proceed with all reasonable despatch; but she did not: 4. That the agreement was rescinded before breach; 5. To the second count, that the plaintiff was not ready to complete the voyage; 6. To the third count, never indebted.

The plaintiff joined issue on the 1st, 3rd, 4th, 5th and 6th pleas, and replied to the 2nd plea: 1. A denial of the agreement that vessel was to arrive at Kingston before the close of navigation of 1869; and 2. That the vessel did arrive in time to carry the load to Kingston. Issue.

The cause was tried before *Wilson, J.*, at the Spring Assizes of 1870, at Hamilton, without a jury.

It appeared that the vessel left Kingston on the 24th October, but owing to heavy weather, with head winds, and the loss of her anchors on Lake Erie, which caused her to put back to Port Colborne, she did not reach Detroit until the 17th November. The defendant met her there, and refused to ship the grain, saying that he had intended to send it by steamer from Montreal to Europe, and that it was then too late in the season to do this.

At the close of the plaintiff's case, *M. C. Cameron, Q.C.*, for defendant, took several objections to the plaintiff's right to recover; amongst them, that the contract was one to be performed within a reasonable time, which must mean according to the ordinary course of time required for the voyage: that the contract was not wind and weather permitting, and the twenty-seven days taken by the plaintiff's vessel to reach Detroit was not a reasonable time.

The learned Judge decided all the other points taken in favour of the plaintiff, and concluded as follows: "I think the plaintiff was obliged to have his vessel at the place of loading within a reasonable time. And I think, on the whole of the evidence, though he did his best to fulfil his

contract, that the vessel was not at her destination within a reasonable time, and that the defendant was not bound to give the wheat to the vessel when the captain desired it.

The learned Judge proposed to go on with the case. The defendant's counsel said he found he required a witness, and could not safely go to trial without him, and he therefore pressed for a nonsuit, which was directed.

In Easter Term last, *Sadleir* obtained a rule to set aside the nonsuit, for misdirection, stating the grounds, which were, in substance, that the learned Judge was wrong in ruling that, the delay in reaching the place of destination having arisen from stress of weather, the plaintiff could not recover; whereas he should have ruled, that under the circumstances as proved the plaintiff had performed his part of the contract in a reasonable time.

During the same Term, *M. C. Cameron*, Q. C., shewed cause, referring to *Barker v. McAndrew*, 18 C. B. N. S. 759; *Hurst v. Usborne*, 18 C. B. 144.

*Sadleir*, in support of the rule, cited *Abbott on Shipping*, 8th ed., 246, 354; *Hall v. Cazenove*, 4 East 477; *Havelock v. Geddes*, 10 East 555; *Add. Con.* 876; *Clipsham v. Vertue*, 5 Q. B. 265; *Shubrick v. Salmond*, 3 Burr. 1637.

RICHARDS, C. J., delivered the judgment of the Court.

We think it better that a new trial should be had in this matter, that all the evidence that can be given may be brought out.

The case of *Hurst v. Usborne*, 18 C. B. 144, in some respects resembled this. There, on the 22nd September, the charter party was entered into at London. The vessel was at sea, bound to Havre. It was provided that she should sail with all convenient speed, and proceed to the north of England, for coals, and from thence proceed to Limerick, and there load from the factors of the affreighters, a full and complete cargo of grain, or other lawful merchandize; and being so loaded, she should proceed therewith to London, and deliver the same on being paid freight.

The charter party contained the usual exceptions of the act of God, the Queen's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation, of whatever nature or kind soever, during the said voyage. When the charter party was entered into the vessel was at sea, and she only arrived at Havre on the 23rd November. On the 26th of December she sailed from Havre, but was obliged to put back, and after various accidents arrived at Shields on the 12th February, where she loaded a cargo of coals on the 22nd or 23rd, proceeded to sea on the 27th, and only reached Limerick on the 1st of April, consuming 202 days in a voyage which usually did not exceed 50; but the delay, under the circumstances, was unavoidable. The defendant refused to load her. Evidence was offered to shew—the charter party being for a cargo of grain—that the Limerick export trade only takes place in the winter months. The Lord Chief Justice declined to receive the evidence.

In giving judgment, Cresswell, J., said: "Looking at the charter party, I find it states that the ship, being tight, &c., shall, with all convenient speed, sail and proceed to the north of England for coals, and from thence proceed to Limerick, and there load. \* \* I find nothing as to time, except what the law will imply, viz., that it shall be a reasonable time."

Willes, J., in his judgment said: "As to the other question, whether the construction of the charter party can be affected by the fact that the particular description of cargo could only be supplied at a certain season of the year—the answer to that, I apprehend, is, that the charter party was probably entered into in the hope that the vessel would arrive at Limerick at that time of the year. But the question is, who takes the risk whether she will or not? Why, the person who is to ship the goods takes the risk, unless he stipulates that the other party shall take it. Here it is not stipulated that the vessel shall arrive at Limerick by any particular day; but only that she shall proceed there with all convenient speed. The owner has

performed his contract, to proceed to Limerick with all convenient speed, when he has done all he could, but was prevented by dangers of the seas."

It is true that there is no exception of the dangers of the seas or navigation expressed in the agreement between these parties; but from the very nature of the contract, as set out in the declaration—viz., that the plaintiff's barque should, with all convenient speed, sail from the port of Kingston to the port of Dresden," &c.—it would seem to be implied; or perhaps if delays occurred, but not through the fault of the vessel or crew, the contract would still be performed by the plaintiff, though the voyage might have been longer than usual.

The case of *Touteng et al v. Hubbard*, 3 B. & P. 291, was on a charter party made on the 13th December, 1800, of a Swedish vessel then lying in the Thames, with all convenient speed to sail and proceed to the Island of St. Michael's, and there receive a full cargo of fruit, in boxes, and, being so loaded, should proceed therewith to the port of London (the only exception was "restraint of princes and rulers during the said voyage always excepted). The vessel started on her voyage on the 22nd December, and was driven back by contrary winds, and on the 15th January she was stopped in Ramsgate harbour by an embargo from the English Government upon all Swedish vessels, and detained by virtue of the same till the 19th June following. The season for the shipment of fruit at St. Michael's was then over, the latest time for ships sailing from England, in order to have the benefit of the season, being the latter end of February; and the captain, as soon as he conveniently could after the ship was released, on the 2nd July, 1801, informed defendant that the ship was ready to proceed on her voyage. On the 4th of July, the defendant gave the captain notice that the ship could not be loaded, as the season for shipping fruit had passed, and the captain would make the voyage at his peril. A verdict was rendered for the plaintiff, which was subject to the opinion of the Court on the special case. In the argument

it was stated, "It may perhaps be contended, that, as the object of the voyage was to obtain a cargo of fruit, and it became impossible, in consequence of the embargo, that the ship should arrive at St. Michael's until after the fruit season, the defendant was discharged; but as the delay was not owing to any neglect of the captain, and no time of arrival was stipulated for in the contract, he would be entitled to freight at whatever time he might arrive. The ship might have been prevented from arriving in time by other accidents, as well as by an embargo, such as wind, weather, &c., and yet, in such case, the defendant must have paid the freight." Lord Alvanley, C. J., in giving judgment, said: "If this had not been the case of a Swedish ship hired by an English merchant, the merchant would have been under the necessity of furnishing the ship with a cargo if she had arrived at St. Michael's as soon as she conveniently might after the embargo was taken off, although by arriving after the fruit season was over the object of the voyage might be defeated." In that case the Court held that, under the circumstances, an English merchant could not properly be compelled to indemnify the owner of a Swedish ship for injuries inflicted on him by the British Government in the nature of punishment for an act of the Swedish Court.

In some of the cases it is said, the captain undertook to proceed with all convenient speed, and if he loiters by the way, it is an answer to the action. So if he fails to perform the contract by his own default, or the delay arises from a deviation in the voyage, there the shipowners must suffer the loss.

Here the learned Judge seems to have entertained the opinion that the delay in the arrival of the vessel at Detroit, though unusual, was from no default of the plaintiff, or of the captain or crew of his vessel, and under the evidence given at the trial, and the authorities we have referred to, we all think it ought to be considered that he did so "with all convenient speed," according to the words of the contract set out in the declaration.

*Rule absolute.*

## KINNEAR AND THE CORPORATION OF THE COUNTY OF HALDIMAND.

*River separating townships—Obligation to erect bridges over—Municipal Act, 1866, sec. 341, sub-sec. 12, construction of.*

The Grand River forms the boundary, for about eleven miles, between the townships of Seneca and Oneida, in the County of Haldimand. At the village of Indiana, on the Seneca side, a bridge had been first erected in 1850, by a private individual, which was carried away by the spring freshets and ice. Two bridges afterwards built there by Joint Stock Companies had been also carried away, the last in 1868. A ratepayer of Oneida then applied for a mandamus to the County Council, under the Municipal Act of 1866, sec. 341, sub-sec. 12, to compel them to erect a bridge there, which was opposed on affidavits, shewing that there were other bridges at different points, and that the erection of a bridge there would be very expensive, and not in the interest of the County at large.

The application was refused, for 1. The bridge having been built by a Joint Stock Company, the public could not be bound to repair it; and at all events, the obligation being at least very doubtful, the parties should be left to their remedy by indictment; and 2. The place, at which such bridges should be erected must be in the discretion of the Council.

*Quære*, whether sec. 341, sub-sec. 12, applies where the river only separates two townships in the same county, but does not form a county boundary.

*Harrison, Q. C.*, obtained a rule to shew cause why a mandamus should not issue commanding the council of the corporation of Haldimand, to erect and maintain a bridge over the Grand River, at the village of Indiana, where said river forms the boundary line between the townships of Seneca and Oneida, in the said county, and why the council should not pay the costs of the application, on the ground that it was their duty to erect and maintain the said bridge, and they had refused so to do, although duly demanded.

The affidavits filed on the application shewed that the Grand River forms the township boundary line, for about eleven miles, between the townships of Seneca and Oneida. The first bridge known to have been erected across the river at Indiana was built about twenty years ago, by the late David Thompson, of the township of Seneca, he having furnished all or nearly all the money required for the building of the bridge. This bridge was carried away

about 1851, by the spring freshet, which causes the river to overflow its banks every spring; the bridge not having been properly constructed to withstand the freshets.

The next bridge was erected about 1852, by a Joint Stock Company, and was carried away by a spring freshet in 1866. It had then become very much decayed.

About 1867 another bridge was erected across the same river, at the village of Indiana, by another Joint Stock Company, and that was carried away by a spring freshet, about 1868, in consequence of the piers not having been properly secured by ice-breakers, the company not being able to furnish the means to procure the ice-breakers. The shareholders of the bridge applied to the county council, in 1868, to grant them \$200 to assist in putting proper ice-breakers on the bridge; but after discussing the matter in council, they, by a vote, refused any aid whatever.

Since the bridge was carried away in 1868, there had been no bridge over the river at or near the village of Indiana. There is in Indiana a large grist and flouring mill, a carding and fulling mill, a distillery, and saw mill, also a pail factory, in addition to other places of business, which, it was stated, had all suffered great loss and serious inconvenience, in consequence of no bridge being across the river there; and it was alleged that the absence of the bridge at the village had caused great inconvenience and loss to a large portion of the rate-payers of Seneca and Oneida, as well as in other municipalities in the county of Haldimand.

The affidavits also shewed that there was a public road or highway, leading from and through the township of Oneida to Indiana, which is situated on the Seneca side of the river, as also a public highway leading to that village through the township of Seneca, the bridge at Indiana forming the connecting link between these roads for many years, and that there was no bridge to cross the river nearer than three miles from said village, on either side of it.

On the 23rd February last, Mr. Kinnear (on whose appli-

cation this rule was granted, and who was a ratepayer of the township of Seneca, residing in the village of Oneida) served on the Warden of the county a notice, addressed to him and the members of the Municipal Council of the County of Haldimand, requesting that they would at once take measures to erect a bridge at the village of Indiana, in connection with the public highways on each side thereof, according to the requirements of the Municipal Act. This notice was served on the Warden, at a meeting of the county council. The council, by a majority of the votes of its members, refused to build said bridge, alleging, as a reason, that they were not liable or compellable so to do.

The river forms the boundary between the two townships for about nine miles north of the village, and two miles south of it.

The above facts, as far as they are of importance, were verified by the affidavits of eight of the ratepayers of the townships of Seneca and Oneida.

In answer, affidavits were filed shewing that the road in Oneida, referred to in the prior affidavits filed on the application, is laid out and runs through only a very small part of the township, across the easterly corner thereof: that it is not a general leading highway of the county, as leading to or from the village of Indiana, or to or from any other place without the county, the travel on it, when it was connected by bridge with the village, being principally that of the inhabitants who resided upon or near it in the vicinity of the village: that by far the greater portion of the inhabitants and ratepayers of Oneida cross the river either at Cayuga, the county town of the county, or at the village of York or Caledonia, in the said county, at all of which places there are now bridges erected over the river: that the bridges at York and Caledonia connect those villages with the township of Oneida, the distance between those villages being not more than five miles, and the distance between Indiana and Cayuga being not more than three miles:

that on the north side of the river there is no general leading road in the township of Seneca leading to or from Indiana, and leading direct to or from or connecting in the same course with the said road on the south side of the river in Oneida, or to or from the bridge across the river at Indiana, the only general leading highway passing to or from Indiana being that known as the River Road, following the course of the river, leading from Indiana easterly to Cayuga, and westerly to Caledonia: that there is a grist and saw-mills at Mount Healy, in the township of Oneida, not more than a mile and a quarter from Indiana, and there are other grist and saw-mills in Oneida: that no bridge had ever been erected across the river at Indiana by any municipal corporation under the provisions of any of the Municipal Acts: that the cost of erecting a proper bridge across the river at Indiana, and one that might possibly withstand the great pressure of ice and highwater it would have to resist, would not be less than \$10,000: that the erecting and sustaining a bridge across the river there at the expense of the county would not be in the interest or for the benefit of the county at large, but simply or mainly for the benefit of the residents and ratepayers of the village of Indiana and neighbourhood; and that such a bridge would not connect with a township boundary line road on either side of the river.

There were about nine affidavits filed, setting up generally the same facts as above referred to, so far as they are of importance in this matter.

The affidavits further shewed, that the Grand River, in addition to being the boundary between Seneca and Oneida, was also the boundary line between Canboro' and Dunn, and North Cayuga and South Cayuga, between which townships there had never been any bridge across the river, the distance between Cayuga and Dunnville being fifteen miles: that the river between these townships is in no place less than a quarter of a mile wide, and in many places exceeding half a mile, and there are also

marshes of great extent and depth, so that bridges across the river between these townships could only be erected and maintained at an immense expense to the county: that the river also divides Moulton from Dunn, across which there is no bridge save at the mouth of the river, and bridges there could only be erected at great expense, and would be likely to interfere with the navigation of the stream.

There was also an affidavit stating that the Grand River, flowing through the county of Haldimand, was a broad and navigable stream.

*M. C. Cameron*, Q.C., during this term, shewed cause. The application is based on sub-sec. 12 of sec. 341 of the Municipal Act of 1866. That sub-section only applies to bridges over rivers that are township and county boundary lines, where the river is the boundary between the two counties. Sec. 329 gives the same jurisdiction between townships. The part of sub-sec. 12, which points out the mode of settling the matter when the two county councils cannot agree, shews that the section was intended to apply to boundaries of counties. The county council cannot, under that section, be compelled to erect bridges for every man or half dozen men that ask for them. This was a joint stock bridge; the proprietors are bound to repair, and they cannot compel the county council to do it for them. The Court will not compel the county to repair a bridge even if they are bound to do it, by *mandamus*; they will leave the parties to enforce their rights by indictment. There is no public road in Seneca connecting with another public road in Oneida by means of this bridge; the only road in Seneca is on land laid out as a town plot of the village. The request to the council to construct the bridge should at all events be made by the municipalities affected by it. There is no sufficient demand of the council, if the council be even bound to do it. They are not the corporation. The demand was made on a notice directed to and served on the warden at a meeting

of the council. The rule calls on the corporation of the county of Haldimand; the parties who constitute the council should be called on by name. The writ would require them to erect and maintain; they can only properly be called on to erect, and others may be the parties to maintain: *Regina v. Brown and Street*, 13 C. P. 356; *Regina v. Oxford and Witney Road Trustees*, 12 A. & E. 427; *Municipality of Augusta and the Municipal Council of Leeds and Grenville*, 12 U. C. R. 522; *School Trustees of Otonabee, &c., and Casement*, 17 U. C. R. 275. It is shewn that the Grand River is a navigable stream, and there is no authority to construct a bridge over it. This is a matter in the discretion of the Court; and they will not compel the municipality, on an application such as has been made to them, to expend a large sum of money to construct this bridge. If it can be demanded of them as a matter of right, then every man or mill-owner may compel the erection of an expensive bridge from Caledonia to Dunnville, which would be ruinous to the county.

*Harrison, Q.C., contra.* The bridge has been erected there for twenty years. The public have used it, and are bound to repair it: *Rex v. Inhabitants of Kent*, 2 M. & S. 513; *Rex v. Inhabitants of West Riding of York*, 7 East 588; *Rex v. Inhabitants of Devon*, 14 East 477; *Regina v. Inhabitants of Ely*, 15 Q. B. 827. The county council are bound to erect and maintain this bridge under sub-sec. 12, sec. 341, of the Municipal Act. It is a bridge between townships, on a river bounding townships.

Sec. 341 gives the county council exclusive jurisdiction over all bridges across streams separating two townships in the county; and sub-sec. 12 makes it the duty of county councils to erect and maintain bridges over rivers forming township or county boundary lines. Where the bridge is exclusively within the limits of any city, township, town, or incorporated village, under secs. 338, 339, it shall be kept in repair by the corporation, and in default they shall be guilty of a misdemeanor, and also responsible for damages: *Corporation of Wellington v. Wilson et al.*,

14 C. P. 299, S. C. 16 C. P. 124; *Harrold v. Corporation of the County of Simcoe*, 16 C. P. 43, S. C. in appeal, 18 C. P. 9. They can indemnify themselves for the expenditure by levying tolls on the bridge: sec. 333. They can construct a bridge that will not interfere with the navigation; and the affidavits now filed shew that this bridge may be constructed for a less sum than is stated in the other affidavits, and will not interfere with the navigation at all at this point. The mandamus will go as the most efficient remedy, particularly against a corporation: *Tapping on Mandamus*, 131, notes *m, n, o*; *Rex v. Inhabitants of Devon*, 4 B. & C. 670; *Rex v. Inhabitants of Devon*, 5 B. & Ad. 383; *Rex v. Guardians of Epsom Union*, 8 L. T. N. S. 383; *In re The Corporation of Brant and The Corporation of Waterloo*, 19 U. C. R. 450; *Woods v. The Municipality of Wentworth, &c.*, 6 C. P. 101.

Mr. *Harrison* filed two affidavits in reply, stating, amongst other things, that the Grand River is not navigable for boats where it passes the village of Indiana: that there is a canal for boats commencing a few hundred yards on the lower or southern side, where the bridge over the river stood, and continuing a distance of two miles: that there are only two bridges over the river where it forms the boundary between Seneca and Oneida, one at the village of York and the other at the village of Caledonia; that that at York was erected by a Joint Stock Company, and is not in any way under the jurisdiction of the municipal council of Haldimand: and that at Caledonia was erected by the proprietors of the Hamilton and Port Dover Road, nor is that under the control of the said municipal council: that there is a public highway leading through the township of Seneca to the village of Indiana, and connected by the bridge which was over the river, at the village, with another public road leading to said village from and through the township of Oneida, both of such roads having been much travelled for fifteen years: that the road through Seneca has been travelled for more than twenty years, and is a general public road; and besides

these two roads, there has been a public road on each side of the river for a number of years: that the last bridge over the river at Indiana did not cost over \$3,000, and it is believed a sufficient bridge could be erected over said river, at Indiana, for about \$4,000: that the absence of the bridge is a serious inconvenience to the mail carried between Mount Healy and Caledonia and Cayuga.

RICHARDS, C. J., delivered the judgment of the Court.

The first bridge, which was erected in 1851, and which perhaps the public might have used without paying toll, only stood for a year, and the bridge which was erected thereafter, in 1852, was built by a Joint Stock Company, and we presume the public were charged tolls for the use of it. If so, we fail to see any ground for contending that the public or municipality were compelled to repair or rebuild that bridge. If the public used it and paid for its use, there could be no obligation on their part to rebuild it. Under circumstances so doubtful, in any view we might take of the case, we would not compel the municipality to rebuild the bridge by a mandamus, but leave the parties complaining to indict for the non-repair.

Then is the county municipality bound, under the Municipal Act, to build a bridge at Indiana, because a gentleman living in the town has requested them "at once to take measures to do so," the river over which the bridge is to be built being a stream separating two townships in the county.

Sec. 341, and sub-sec. 12, are the sections of the Municipal Act which are relied on as making it compulsory on the county municipality to build the bridge at Indiana.

Sec. 341, is as follows: "The county council shall have exclusive jurisdiction over all roads and bridges lying within any township of the county, and which the council by by-law assumes as a county road or bridge, until the by-law has been repealed by the council; and over all bridges across streams separating two townships in the county; and over every road or bridge dividing different

townships, although such road or bridge may so deviate as in some places to lie, wholly or in part, within one township."

It is not contended that this section creates the obligation to build the bridge, but that it gives the jurisdiction to the council over the locality, and that sub-sec. 12 creates the obligation to build. The sub-section is as follows: "It shall be the duty of county councils to erect and maintain bridges over rivers forming township or county boundary lines; and in the case of county councils failing to agree on the respective portions of the expense to be borne by the several counties, it shall be the duty of each county council to appoint arbitrators as provided by this Act, to determine the amount to be so expended, and such award as may be made shall be final."

The 338th section of the Act vests the highways in the cities, and other local municipalities, in the respective municipalities; but sec. 339 creates the obligation to keep them in repair, and makes them liable to indictment if the duty is neglected, and for all damages sustained by any person by reason of such default.

Though sec. 341 gives exclusive jurisdiction to the county municipality over every road or bridge dividing different townships, yet sub-sec. 1, under the head of "TOWNSHIP BOUNDARY LINES," provides that "All township boundary lines not assumed by the county council shall be opened, maintained and improved by the township councils." The five following sub-sections shew how the expenses incurred shall be borne and paid. Then follows the head:—"COUNTY BOUNDARIES." Sub-sec. 7 enacts that "township boundary-line roads, forming also the county boundary lines, and not assumed or maintained by the respective counties interested, shall be maintained by the respective townships bordering on the same." Sub-secs. 8, 9, and 10, provide for the mode of determining the share of expense to be borne by the respective townships for maintaining the roads. Sub-sec. 11 provides that "any county council may assume, make and maintain any town-

ship or county lines at the expense of the county, or may grant such sum or sums from time to time for the said purpose, as they may deem expedient." Then follows sub-sec. 12, already quoted.

Sec. 342 provides that when the county council assumes by by-law any road or bridge within a township as a county road or bridge, the council shall, with as little delay as may be, and at the expense of the county, cause the road to be planked, gravelled or macadamized, or the bridge to be built in a good and substantial manner.

There is much ground for urging that sub-sec. 12 only refers to bridges over rivers forming township boundaries when they also form county boundary-lines. The subsection is under the general head of "County Boundaries," and if it had simply mentioned rivers forming county boundary lines, it might have been urged that the rivers formed the township boundaries, and that the counties only included townships, and therefore if they spoke of rivers forming county boundary lines it would have been improper, and therefore the Legislature used the term township or county boundary lines. Besides, one county might have a river boundary lying between it and two or three different counties, and the same river might be the boundary of several different townships in separate counties.

Although the county council has exclusive jurisdiction over any road or bridge dividing different townships, yet these township boundary lines not assumed by the county council are to be opened, maintained and improved by the township councils, and the expense properly apportioned.

There seems no greater reason why the county should build the bridges between the townships out of the county funds, than that they should maintain the lines of road forming the boundary lines between two townships. But, on the other hand, it may be urged that, in respect to all the other roads and boundaries, &c., provision is made by other sections of the Act, except bridges between townships, and that is made by sub-section 12.

Sub-sec. 7 makes provision that township boundary-line

roads forming also county boundary lines, and not assumed or maintained by the respective counties interested, shall be maintained by the respective townships bordering on the same. Yet as to bridges across rivers forming these boundaries, the county councils are to build them; and unless the provision as to township boundary lines, sub-section 1, extends to bridges across streams separating two townships, no special provision other than that under sub-sec. 12 is made for erecting bridges over such streams when they do not form boundaries between counties.

The inclination of my mind, on the whole, is in favour of that conclusion, but it is not necessary absolutely to decide it in the view we take of the liability under that sub-section, supposing it imposes the duty on the county council to build bridges over rivers forming the boundary line between two townships within the county.

It must be a matter of discretion with the county council where to build these bridges. It can never be the right of any one inhabitant to compel the expenditure of so large a sum of money as it would require to build these bridges, and at such places as such inhabitant might consider the best.

It appears there is a bridge crossing the Grand River about three miles south of Indiana, at Cayuga, and about five miles north of it, at York, and another bridge about five miles north of York, at Caledonia. It is not shewn that the road through Indiana is such a thoroughfare between the two townships as to call for the erection of a bridge across the river there as a matter of general interest and advantage to the inhabitants of the county, or of those two townships alone.

No doubt it is of importance to the inhabitants of the village of Indiana and the residents of Seneca and Oneida in the immediate vicinity of the bridge; but if the county council in their discretion do not consider it necessary to build a bridge there at the expense of the county, we do not think we ought to compel them.

Those living in the vicinity of Indiana, and interested

in its prosperity, and connected with its business, seem to have understood it was for their interest to have a bridge there, and they took steps to have it erected. They have kept up a bridge there for nearly twenty years, and have probably found it to their advantage to do so. If they can succeed in compelling the county to keep up the bridge for them, the inhabitants of the village of York, when the bridge at that place is carried away, as it may be at any time, will be likely to follow the same course, and the county generally will be compelled to pay for expensive bridges, which are for the advantage of a small section only of the inhabitants.

The facts disclosed on the affidavits shew that the county of Haldimand, having many of its townships separated by the Grand River, may be compelled to erect a very great number of bridges, if they are obliged to do so at the call of a single individual, or on the demand of any inhabitant who may reside in a small hamlet or village, where there is a mill, a merchant's shop, and some manufacturing business being carried on.

We think, if it be the duty of the municipality of the county to erect the bridges over rivers forming the boundaries of townships, that they must have a discretion as to the place where they shall be erected, and must be allowed, to some extent, to judge of the necessity for such erection. We are not satisfied that a case has been made out requiring us to issue a mandamus to compel the county council of Haldimand to erect a bridge at Indiana, and therefore discharge this rule, with costs.

*Rule discharged.*

## CULHAM ET UX V. LOVE ET AL.

## LOVE V. CULHAM ET AL.

*Replevin—Action on replevin bond while replevin pending—Application to stay proceedings.*

L. brought replevin for his goods, which C. had distrained for rent. While the action was pending, and before declaration, C. took an assignment of the replevin bond, and sued L. and his sureties thereon. Application was then made to stay proceedings in each case—in the suit on the bond, on the ground that until the determination of the action of replevin the rights of the parties on the bond could not be satisfactorily settled; and in the replevin suit, because it had not been prosecuted according to the bond, of which defendants had obtained an assignment. The defendant in replevin moved also for leave to plead, with other pleas, that the plaintiff had not prosecuted his suit with effect and without delay, and that defendant had sued upon the replevin bond before the plaintiff had declared in replevin.

The Court refused to interfere in either case, for as to the action on the bond, whether the replevin had been prosecuted without delay was a question of fact, which could be tried; and as to the replevin, the plaintiff was at liberty to go on and prosecute it with effect.

The proposed plea was not allowed, as it could be no answer to the action.

IN the case of *Culham and Wife v. Love et al.*, being an action on a replevin bond, *C. Robinson*, Q.C., moved to stay the proceedings until the replevin suit in which the bond was given should be tried, or until such time as the Court should think proper, on the ground that the replevin suit was still pending, and the plaintiff had done nothing therein to forfeit the replevin bond, and the rights of the parties in the suit could not be satisfactorily determined or tried until the determination or trial of the action of replevin; and why defendants should not have ten days further time to plead.

From the affidavits filed it appeared that, prior to the month of February, 1867, an action of ejectment was brought by the above named plaintiffs against the defendant Love to recover possession of a piece of land leased to him, on the ground of forfeiture of the term for non-payment of the rent. That action was defended; at first judgment was signed for want of appearance, but afterwards a defence was put in.

In 1868, whilst the former action was pending, another action was commenced between the same parties, arising out of the same difficulty as to payment of rent, the rent being payable partly in cordwood and partly in money.

Notice of trial was given in that action for the Spring Assizes of 1868, but was set aside for irregularity, with costs, and a Judge's order was obtained to stay one of the two ejectment suits, as the plaintiffs might elect, and the plaintiffs to pay the costs in the suit stayed; and the proceedings in both suits were stayed until the election was made, and the plaintiffs were to pay the costs of that application.

Without taking any further steps in those suits, or paying the costs, the plaintiffs distrained on Love's goods for rent, and on the 20th September, 1869, Love commenced proceedings in replevin, on which the bond now sued on was given, and on it the property seized was delivered over to Love on the 21st September. No further proceedings were taken by the plaintiff in the replevin suit until the 22nd of February, when Love declared in that suit.

On the 16th of February, Culham and wife took an assignment of the replevin bond, and issued a writ on it against Love and the sureties named in the bond. On the 3rd of March they declared in that suit, and on the 4th of March application was made in Chambers to stay the proceedings until the replevin suit was tried.

In the affidavits filed on behalf of the defendants, it was stated that it was necessary that the replevin suit should be tried to ascertain the merits of the case, or do justice between the parties: that the delay in bringing the case to trial arose from the desire of the plaintiff in the replevin suit to avoid more costs being made between the parties, the costs then incurred being very great, and also in consequence of one of the plaintiffs expressing a desire that matters might be amicably arranged between them, and that the hope and desire to have the amicable arrangement made was the only cause of the delay. The

application was postponed, and the parties decided to apply in term in both suits.

In *Love v. Culham et al.*, the replevin suit, *M. C. Cameron*, Q. C., moved to stay all proceedings, and to set aside the declaration served, on the ground that, the action being replevin, the plaintiff did not prosecute the suit with effect and without delay against the defendant, according to the condition of the replevin bond given by him and three sureties to the Sheriff of the county of York, and that defendants had obtained an assignment of such bond from the Sheriff, and commenced an action, and were, at the time the plaintiff declared herein, proceeding with an action upon the said bond against the plaintiff and his sureties therein, and that the condition of the said bond having been broken, and an action commenced thereon, the plaintiff is not now entitled to proceed with this action; and he moved also that the plaintiff have leave to avow and plead to the plaintiffs' declaration, 1. Avowry for rent in arrear from the plaintiff. 2. That the plaintiff has not prosecuted the action with effect and without delay, according to the condition of his bond in that behalf, and that, after such breach of the bond, the defendant herein had obtained an assignment of the replevin bond, and had commenced an action thereon before the plaintiff declared in the replevin suit.

In support of the application, a copy of the lease from Culham and wife to Love was filed, and there was an express denial of a tender of the money due for rent, the only tender being one coupled with a condition that a receipt in full should be given. Culham, in his affidavit, stated that the actions of ejectment were brought to compel the payment of the rent, which they had all along been willing to receive: that he believed that Love had taken the course he had to keep his wife out of her rent as long as possible, and that Love could have gone on with the replevin suit if he chose, but he believed the delay arose from a wish to throw them over.

On the last day of Easter Term, *Robinson*, Q.C., supported his rule, and shewed cause to the other, citing *Harrison v. Wardle*, 5 B. & Ad. 152; *Brackenbury v. Pell*, 12 East 585; *Caswell v. Catton*, 9 U. C. R. 462; *Welsh v. O'Brien*, 28 U. C. R. 405; *Bletcher v. Burn*, 24 U. C. R. 259, 266.

*M. C. Cameron*, Q.C., contra, cited, *Gent v. Cutts*, 11 Q.B. 288; *Axford v. Perrett*, 4 Bing. 586; *Anonymous*, 5 Taunt. 776; *Rider v. Edwards*, 3 M. & G. 202; *Lush*. Prac. 10.

RICHARDS, C. J., delivered the judgment of the Court.

We have examined all the authorities referred to on the argument. The most important of them attracted our attention in the case of *Welsh v. O'Brien*, 28 U. C. R. 405.

We fail to see any ground on which we can properly stay the proceedings on the replevin bond. The defendants, if the replevin suit is pending, of which there seems to be no doubt, can well answer a breach which alleges that the plaintiff did not prosecute his suit with effect. As to prosecuting without delay, that must be a matter of fact, which can be tried. As to what is prosecuting without delay, the cases of *Morris v. Matthews*, 2 Q. B. 293, and *Gent v. Cutts*, 11 Q. B. 388, may be referred to with advantage. We do not think any sufficient case is made out on the affidavits that Love was induced to delay proceeding in the replevin suit in consequence of what Mrs. Culham said to him. It is said on their behalf that they always have been, and are now, desirous of having the matter settled without further litigation or delay, and on the argument offered to refer the whole matter to arbitration.

We think, therefore, that the application to stay the proceedings on the replevin bond must fail.

Then as to staying the proceedings in the replevin suit, we can see no sufficient ground for doing so. If the defendant in that suit had desired that the replevin suit should be determined, he was at liberty to take the usual proceedings for expediting it; and if he thought he ought

not to resort to those proceedings, the delay being such as to cause a breach of the bond for not prosecuting the suit without delay, he was at liberty to take the course he did, of obtaining an assignment of the replevin bond and suing on it.

We do not see why the plaintiff in the replevin suit may not go on with it and prosecute it with effect if he chooses to do so. He possibly conceives it may be of advantage to him, and it is likely it would be if he succeeds, if the issue as to prosecuting without delay and effect is found for him in the action on the replevin bond.

The second plea which the defendant wishes to plead in the replevin suit does not appear to us to be any answer to the action. He certainly cannot plead it in the very suit itself, which shews that he, the plaintiff, has not prosecuted it to an unsuccessful termination, and that is what is considered a breach of that part of the bond. The plaintiff may not have prosecuted the suit without delay, and therefore the replevin bond may be forfeited, and the defendants in the replevin suit may sue on the bond.

If the plaintiff in the replevin suit succeeds, it is probable he will apply to the Court to exercise its equitable jurisdiction in restraining the plaintiffs, in the action on the replevin bond, from levying more than nominal damages for the mere delay. If he is unsuccessful, the landlord will have a judgment through which he may enforce the payment of his rent more speedily than if he had waited to see if the replevin suit had not been prosecuted with effect.

We are of opinion both rules should be discharged, and the parties in both suits should have further reasonable time to plead.

It seems strange, when both parties so much desire to put an end to litigation, that all these matters between the parties cannot be referred to some respectable professional gentleman to settle. Such a reference, which the tenant has offered to make, would put an end to three or four law suits, and possibly might prevent one or both

parties from wasting their substance, if not ruining themselves, in useless litigation.

Both rules will be discharged without costs, with two weeks' further time to plead in both cases.

*Rules discharged.*

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GALLAGHER V. GALLAGHER.

*Infant—Right to avoid agreement.*

Declaration on defendant's covenant to pay off a mortgage to one L., on land conveyed by him to the plaintiff, alleging non-payment, and a sale of the land under the mortgage to one M., who evicted the plaintiff.

Plea, on equitable grounds, that before the mortgage fell due defendant, at the plaintiff's request, advanced to him the money required to pay it off, which the plaintiff promised and gave his bond to the defendant to do: that afterwards the plaintiff, owing defendant \$400, gave him a mortgage therefor upon the same land: that when the mortgage to L. fell due, the plaintiff being unable to pay it off according to his bond, it was agreed by all parties that L. should sell one-half of the land for more than her mortgage, and pay the plaintiff the surplus, and release to the plaintiff the other half: that L. accordingly sold half the land to M., and released the other half to the plaintiff by deed, in which the defendant joined, which deed the plaintiff accepted, and L. also paid to the plaintiff the balance of the purchase money received for the other half, above L.'s mortgage.

Replication, that the plaintiff, when all these transactions took place, was an infant, by reason whereof his alleged bond and mortgage were voidable, and he has avoided the same.

*Held*, that the replication was good, for that there was nothing alleged in the plea to which the plaintiff was prevented from setting up his infancy as an answer, and he might avoid the bond and mortgage whenever they were relied upon against him.

DECLARATION, by John Gallagher, an infant, suing by Joseph Morgan as his next friend, that the defendant, by deed, did grant to the plaintiff, his heirs and assigns, the west half of lot 20 in the third concession of the township of Flos, and did, by the same deed, covenant, in pursuance of "An Act respecting short forms of Conveyances," that the defendant should have quiet possession of the said land, free from all incumbrances, notwithstanding any act of the said defendant, save and except a certain mortgage for about \$250, which the defendant covenanted to pay

when the same became due. And all conditions were fulfilled, &c.; yet the defendant did not pay the said mortgage when it became due, but made default, whereby one L., under a power of sale in the mortgage contained, sold and conveyed the said land to one M., who thereupon evicted the plaintiff; by reason whereof the plaintiff hath lost and been deprived of the said land.

*Plea*, on equitable grounds, that after the making of the deed in the declaration mentioned, and before the said mortgage to the said L. became due, the defendant, at the request of the plaintiff and for his benefit, advanced to the plaintiff the sum required to pay off the said mortgage to the said L., and the plaintiff thereupon promised, agreed, and undertook himself to pay off the said mortgage to the said L., instead of the defendant, and in pursuance of this agreement, and in consideration of the sum then advanced to him, the plaintiff then executed a bond to the defendant for the paying off by the plaintiff of the mortgage from the defendant to the said L., reciting in said bond that since the making of the deed in the declaration mentioned it was agreed between the plaintiff and defendant that the plaintiff, instead of the defendant, should pay off the mortgage to the said L., he, the plaintiff, having received a good and sufficient consideration therefor; and that after the execution and delivery of the said bond the plaintiff, being indebted to the defendant in the sum of \$400, made and executed to the defendant a mortgage upon the lands in the declaration mentioned, securing the said sum of \$400, which mortgage has never been paid by the plaintiff, nor the moneys secured thereby, but the same still remains unpaid: that after the said mortgage to the said L. became due, the plaintiff being unable, in accordance with the terms of his said bond, to pay off the same, it was agreed between all parties that the said L. should sell one-half of the lands mortgaged to her for a sum more than sufficient to pay off the said mortgage and costs incident to sale, &c., and that she should pay over to the plaintiff the overplus, and also grant and release to the

plaintiff the other half of the mortgaged lands: that in pursuance of said agreement the said L. did sell and convey to one M. the north half of the west half of lot twenty in the third concession of Flos (being the lands mentioned in the declaration), and did grant and release the south half of the same lot to the plaintiff, by deed, wherein the defendant joined to release any interest he might have to the plaintiff, which deed the plaintiff accepted; and that the said L. did also pay to the plaintiff the balance of the purchase money received for the said north half, after payment of the mortgage money, interest, and costs.

*Replication*, that at the time of the execution of the alleged bond in the plea mentioned, and of the execution of the said pretended mortgage also in said plea mentioned, and at the time of the making of the said alleged agreements and of the happening of the events in the said plea mentioned, the plaintiff was a minor within the age of twenty-one years. And the plaintiff says that the said pretended bond and mortgage were, by reason of the plaintiff's infancy at the time of the alleged execution thereof, voidable, and that the plaintiff has avoided the same.

*Demurrer*, that the avoidance by the plaintiff in the replication stated is not alleged to have been before the commencement of this suit; and under the circumstances averred in the plea it was not in the plaintiff's power to avoid the transactions there set forth.

The plaintiff joined in demurrer, and gave notice of the following exceptions to the plea:—1. That it appears from the pleadings that the plaintiff was and still is an infant within the age of twenty-one years, and could not promise and agree to pay off the said mortgage so as to bind him, and to entitle the defendant to set up as a justification for his breach of covenant the said alleged agreement of the plaintiff; 2. That the plaintiff, by reason of his minority, was incapable of entering into any of the alleged agreements, or of executing any of the alleged instruments in the said plea mentioned; 3. That if the agreements and

instruments in the said plea alleged to be made and executed by the defendant were so made and executed by him, the bringing of this suit is of itself a sufficient avoidance of the same, and such pretended agreements and instruments cannot be pleaded in bar of the plaintiff's cause of action.

*C. Robinson*, Q.C., for the demurrer. The plea is in effect a statement that the defendant gave to the plaintiff the money with which to pay off the mortgage, and this is an answer to the action, notwithstanding the plaintiff's infancy. The plaintiff, by suing the defendant after such receipt, for not paying off the same mortgage, is taking advantage of his own fraud, which an infant cannot do: *Leary v. Rose*, 10 Grant 346; *Hovenden on Frauds*, 502. In *Bartlett v. Smith*, 1 B. & S. 836, it was held, in an action for goods bargained and sold, that an equitable replication to a plea of infancy that the defendant induced the plaintiff to supply the goods by falsely representing himself to be of age, was no answer. This case is followed in *DeRoo v. Foster*, 12 C. B. N. S. 272; but it seems opposed to *Ex parte Unity Joint Stock Mutual Banking Association*, *In re King*, 3 DeG. & J. 63, S. C. 27 L. J. Bank. 33, and to the doctrine in 10 Grant 346, and *Hovenden on Frauds*, already cited. He referred also to *Wright v. Leonard*, 11 C. B. N. S. 258; *Miller v. Ostrander*, 12 Grant 358; *Gilchrist v. Ramsay*, 27 U. C. R. 500; *Mills v. Davis*, 9 C. P. 510; *Featherston v. McDonell*, 15 C. P. 162; *Hartshorn v. Earley*, 19 C. P. 139; *Baylis v. Dineley*, 3 M. & S. 477; *Price v. Hewett*, 8 Ex. 146; *Liverpool Adelphi Loan Association v. Fairhurst*, 9 Ex. 422; *Holmes v. Blogg*, 8 Taunt. 508; *Smith v. Low*, 1 Atk. 489; *Maddon dem. Baker v. White*, 2 T. R. 159; *Rex v. Inhabitants of Hindringham*, 6 T. R. 558; *Zouch dem. Abbott v. Parsons*, 3 Burr. 1794; *Leake on Con.* 227.

*Crooks*, Q.C., contra. There is no fraud or misrepresentation alleged in this plea. It relies entirely upon contracts stated to have been made by the infant, upon

which he cannot be made liable, and which he had a right to avoid at any time. Specific performance of such an agreement by the infant could not be compelled, and it forms no answer to this action: *Fry* on Specific Performance, 133; *Macpherson* on Infants, 477, 484-494; *Broom* C. L., 582, 583, 4th ed.; B. & L. Prec., 3rd ed., 605; *North Western R. W. Co. v. McMichael*, 5 Ex. 114, 125; *In re Alexandra Park Co.*, L. R. 6 Eq. 512; *Grace v. Whitehead*, 7 Grant 591.

[The Chief Justice referred to *Slator v. Brady*, 14 Ir. C. L. Rep. 61; *Allen v. Allen*, 2 Dr. & W. 307, cited in *Fetherston v. McDonell*, 15 C. P. 166.]

RICHARDS, C. J., delivered the judgment of the Court.

We are of opinion that our judgment must be for the plaintiff on the demurrer to the replication setting up infancy to the equitable plea of the defendant.

The defendant's plea in effect states that he advanced to the plaintiff a sufficient sum to pay off the mortgage which he himself had covenanted to pay, and had taken a bond from him that he would so apply the money that he had paid him, and that afterwards the plaintiff, being indebted to defendant in \$400, gave him a mortgage on the land to secure the payment of the \$400, which the plaintiff has never paid: that the first-mentioned mortgage having matured, and the plaintiff being unable to pay it, it was agreed that the mortgagee should sell one half of the land mortgaged, and after deducting the money due on that mortgage to the mortgagee, and expenses, the balance should be paid over to the plaintiff: that this was done, and that the mortgagee and defendant released any supposed rights they might have in the other half of the lot remaining unsold to the plaintiff, which he accepted.

We fail to see anything here that the plaintiff has done to prevent him setting up his infancy to avoid any agreements he has made. The performance of the first agreement set out in the plea, as to paying off the first mortgage himself, was secured by a bond, and it is said an infant cannot

execute a bond. The second instrument, which it is contended will bar him, is the mortgage he executed to defendant. There is no authority referred to from which it appears he cannot avoid that deed. The substantial part of the rest of the plea is, that he agreed to allow half the land to be sold, and accepted the payment of the surplus money, and a conveyance of the other half to him by the mortgagee and defendant: that he did accept such surplus, and a conveyance from the original mortgagee and the defendant of their interest in the half of the lot unsold. It now appears that he refuses to carry out that agreement.

In *Bacon's Abridgment*, "Infancy and Age," H. pl. 10, it is said: "Neither an infant nor *feme covert* can be guilty of a forcible entry or disseisin by barely commanding one, or assenting to one, for their use, because every such command or assent by persons under their incapacities is void; but an actual entry by an infant into another's freehold gains the possession, and makes him disseisor as well as it does a *feme covert*." And at pl. 16, "Infants are liable for torts and injuries of a private nature; but if an infant, affirming himself to be of age, borrows £100, and gives his bond for it, and being sued upon the bond avoids it by reason of his nonage, yet no action lies against him for the deceit; for though infants shall be bound by actual torts, as trespass, &c., which are *vi et armis*, yet they shall not for those that sound in deceit; for if they should, all the infants in England might be ruined."

There is, of course, no actual tort suggested here, such as trespass, &c., nor, as far as I can see, is there any deceit for which a Court of Equity would relieve. It is not pretended that the plaintiff ever made any false representation that he was of full age, and the contracts and agreements, either express or which the defendant wishes to be implied, were made with a person at a time when such person was known to be an infant.

In *Nelson v. Stocker*, before the Lords Justices, May 31st, June 1st and 30th, 1859, reported in 33 L. T. Rep. 277, Lord Justice Turner said: "Infants are no more entitled

than adults are to gain benefits to themselves by fraud.  
\* \* \* There can be no doubt that it is morally wrong in an infant of competent age, as it is in any other person, to make any false representation whatever; but the Court cannot enforce the observance of obligations or duties which rest upon moral grounds only. \* \* The law has for the wisest reason thrown around infants a protection against acts done by them during their infancy, and the policy of the law cannot be maintained if the privilege of infancy be allowed to be broken in upon on slight and insufficient grounds. If the contracts of infants with persons who know them to be under age are held not now to be binding upon the ground that the infants represented themselves to be of age, there will hardly be a case in which the plea of infancy will be of any avail, and the door will be open to all frauds against infants which the law was intended to protect them from. The privilege of infancy is a legal privilege. On the one hand, it cannot be used by infants for the purposes of fraud; on the other hand, it cannot I think be allowed to be infringed upon by persons who, knowing of the infancy, must be taken also to know of the legal consequences which attach to it."

Here it is not alleged in any way that the plaintiff practised any fraud or deceit on the defendant to induce him to enter into the agreements referred to in this plea, and having entered into those agreements with an infant, the latter is at liberty to avoid them as far as he is concerned.

Looking at the grounds of demurrer mentioned, we fail to see how they can be of any force. *Primâ facie* infancy is a ground for avoiding a contract, and therefore the second objection would not prevail. The first is, that the avoidance is not alleged to be before suit.

If the bond referred to be one with a penalty and condition, the authorities seem to shew that it is absolutely void. If not, then it seems to us, whenever the instruments are set up against the infant or his guardian claiming that he is bound by them, and he is not so bound, he may

avoid them at any time. The authorities in our own Courts shew that in ejectment brought against an infant on his mortgage, he may set up his infancy to avoid the deed: *Gilchrist v. Ramsay*, 27 U. C. R. 501. And in *Doe Jackson v. Woodruffe*, 7 U. C. R. 332, the Court held the infant avoided his deed by bringing ejectment to regain possession contrary to his deed.

Here, whilst he is still an infant, and apparently in possession of the land mortgaged by him, he claims to avoid it as soon as it is set up against him. It does not appear that any possession has been taken by the defendant of the estate mortgaged, and therefore the plaintiff could not do *any act* to avoid the deed such as is referred to in *Slator v. Brady*, 14 Ir. C. L. Rep. 66, except merely to give notice, and I cannot well see what notice the infant could give so effectual as setting up the infancy as soon as the deed is put forth as something binding on him. Besides, this action is not in relation to the contract which or deed which the plaintiff wishes to avoid. No estate passed under the bond, and therefore I apprehend a plea of infancy would avoid that whenever sued on.

It may be urged that an estate passed under the mortgage referred to, and the covenant on which the action is brought was the covenant for quiet enjoyment only, and that covenant running with the land, the defendant has become possessed of the fee of the land, and therefore this action cannot be brought on that covenant against defendant. We understand the covenant for quiet enjoyment specially excepts the incumbrance created by the mortgage made by the defendant, and the liability really arises on the defendant's special covenant to pay that mortgage, which probably would not run with the land.

In any view suggested, it appears to us that the plaintiff may set up his infancy on the facts shewn, and is not estopped from doing so by any thing that has occurred.

The cases cited in our own Courts; *Wright v. Leonard*, 11 C. B. N. S. 258, and the judgment of Willes, J., and the cases there cited and referred to; *Bartlett v. Wells*, 1 B. & S.

836; *North Western R. W. Co. v. McMichael*, and *Birkenhead, &c., R. W. Co. v. Pilcher*, 5 Ex. 114; and *De Roo v. Foster*, 12 C. B. N. S. 272, may all be read with advantage, as shewing the general view taken on the question of infamy in relation to voidable contracts.

*Judgment for plaintiff.*

# REGINA V. JOHNSON ET AL.

*Conviction affirmed on appeal—Certiorari improperly issued—Practice.*

Where a conviction which had been affirmed on appeal to the sessions was brought up by *certiorari*, contrary to the 32-33 Vic., ch. 3, sec. 71, as amended by 33 Vic., ch. 27, sec. 2, which enacts that in such case no *certiorari* shall issue:

*Held*, that the Court could not quash the conviction (the case being one in which the magistrate had jurisdiction,) though it was clearly bad, and no motion had been made to quash the *certiorari*.

*Ferguson*, in Hilary Term last, obtained a rule—upon reading the writ of *certiorari*, tested 10th February, 1870, for the removal of the conviction, the return thereof, the record of conviction, and the recognizance, affidavit, and other papers to the *certiorari* attached, and the affidavits and other papers filed upon the application for the said writ—calling upon Thomas Johnson Grover, J. P., and Michael O'Farrell, in said conviction named, to shew cause why a conviction made on the 20th October, 1869, by said Grover, whereby the defendants were convicted of refusing to obey a summons to attend as witnesses in a case of assault and battery pending before said Grover, between the said O'Farrell and one Wilson, and were fined \$1 each, and \$7.68 for costs, and in default of payment to be imprisoned for ten days, should not be quashed, on various grounds stated.

It appeared by the papers that the defendant Angus Johnson appealed to the next Court of General Sessions of the Peace of Middlesex, held at London on the 14th December, 1869, when an order was made by that Court dismissing the appeal with costs.

During Easter Term, *Bull* shewed cause, citing Consol. Stat. C., ch. 103, secs. 17, 19; 32-33 Vic., ch. 31, sec. 71; *Paley* on Convictions, 5th ed., 403 *et seq.*; *In re Barrett*, 28 U. C. R. 559; *Nixon v. Nanney*, 1 Q. B. 747.

*Ferguson*, contra, cited *Rex v. Sparrow*, 2 T. R. 196 note; *Re Donnelly*, 20 C. P. 165; *Arch. Cr. Pr.* 190; *Paley* on Convictions, 4th ed., 363.

RICHARDS, C. J., delivered the judgment of the Court.

The conviction in this matter seems bad on several of the grounds taken in the rule; but this difficulty lies at the threshold of the case before us: As the law stood at the time the *certiorari* issued, no conviction could be removed by *certiorari* into this Court, under the Dominion Act 32-33 Vic., ch. 31, sec. 71, and since the amendment of that Act by the Dominion Act of 33 Vic., ch. 27, sec. 2, no conviction or order affirmed, or affirmed and amended in appeal, can be removed by *certiorari* into this Court; and this conviction was confirmed on appeal to the Quarter Sessions.

It was objected on the argument that the proper way to raise this question was to move to quash the *certiorari*, and that not having been done, and the conviction being before us, and clearly bad, we ought to quash the conviction.

No doubt there are cases in which the Courts, where a conviction has been brought before them to be enforced, when the right of *certiorari* has been lost or taken away, have nevertheless, in effect, set aside the conviction. But in those cases the Courts have been asked to do something to enforce the convictions. We have not been referred to any case where the Court has quashed a conviction that has not been properly brought before it, where the right to a *certiorari* was expressly taken away by statute.

We cannot but see in this case that the *certiorari* has been expressly taken away, and that the conviction is before us by a proceeding contrary to the express terms of the Act of Parliament; not by a mere irregular proceeding to bring before us that which the party had a

right to bring before us, but has done so in an irregular manner by a proceeding not warranted by law. Under these circumstances we do not feel at liberty to quash this conviction, however defective.

I thought perhaps the *certiorari* might be sustained on the ground that the Justices making the conviction had no jurisdiction whatever to impose a fine for not obeying a summons to attend as a witness, but on referring to the Revised Statutes of Upper Canada, 2 Vic., ch. 4, sec. 2, we find it provided that in all cases in which a summary jurisdiction is given to one or more Justices, by virtue of any Act of the Legislature of this Province, it shall be lawful for the Justices before whom the complaint is made upon oath, to summon persons to appear at a time and place to be named in the summons to give evidence; and every person so summoned, and neglecting to appear pursuant thereto, without reasonable excuse, upon proof of the service of such summons, shall, for every such offence, forfeit any sum not exceeding £5, to be levied by distress and sale of the goods of the offender, and in default of distress to be committed to the common jail for any time not exceeding one month.

*Rule discharged.*

## NORTHEY V. TRUMENHISER.

*Mortgage—Construction—Principal due on default in interest—Declaration.*

In a mortgage made according to the Act respecting Short Forms of Mortgages, the proviso was that it should be void on payment of \$1558, with interest at seven per cent. after maturity until paid, as follows (specifying four instalments making up the \$1558, and the days of payment) with interest on each instalment after it should mature, at the rate aforesaid, until payment. There was also a proviso that on default of payment of the interest the principal should become payable. The plaintiff sued when one instalment had fallen due, alleging in his declaration that defendant covenanted that he would pay the principal money and interest and observe the proviso for payment, but that he did not pay the same nor observe the proviso.

*Held*, 1. That looking at the form of the mortgage and the declaration, the plaintiff was not entitled to a verdict for the whole principal, for the declaration did not clearly shew that he was claiming it by reason of non-payment of the interest, and he was not bound to sue for the whole amount.

2. That the provisos and covenants were not deprived of the meaning given to them by the Act because they were not numbered as in the schedule to it.

*Quære*, there being no day named for payment of the interest, when would there be a default so as to make the whole principal due.

**DECLARATION.** First count, on a promissory note made by defendant, dated 13th October, 1869, payable to the plaintiff, or order, for \$511.67, at three months.

Second count, that by an indenture of mortgage of certain lands of the defendant, therein specified, dated 13th August, 1869, and made in pursuance of the Act respecting Short Forms of Mortgages, between, &c., it was provided that such indenture should be void on payment of \$1558.10, with interest at seven per cent. after maturity until paid, as follows, that is to say: \$511.67 four months after the date thereof, \$523.34 eight months after the date thereof, and \$523.09 fifteen months after the date thereof, with interest on each of such instalments after it should mature at the rate aforesaid until paid; and which indenture also contained the words following concerning such premises, that is to say: "Provided, that in default of the payment of the interest hereby secured, the principal hereby secured shall become payable." The defendant covenanted with the plaintiff concerning the premises that he would pay the said mortgage money and interest and

observe the said proviso for the payment thereof as aforesaid, but the defendant did not pay the same nor observe the said proviso.

Common counts were added.

*Pleas*—1. To first count, payment; 2. To second count, *non est factum*; 3. To second count, payment; 4. To third count, never indebted.

The case was tried at Hamilton, at the last Spring Assizes, before Wilson, J., without a jury.

The execution of the mortgage was proved by the admission of defendant.

The plaintiff claimed

The amount of mortgage .....	\$1558 10
Interest at 7 per cent. from the time the first instalment became due, 13th Dec., 1869, to 27th April, 1870, on the whole sum .....	40 00
	<hr/>
	\$1598 10

The learned Judge expressed a doubt as to the sufficiency of the averment in the declaration, as it did not allege that interest became due, but only that defendant did not pay the same, *i.e.*, interest and principal; and there was no time when the interest was to be paid so as to render due the whole of the principal.

A verdict was taken on the first count for \$521.57, being for the amount of the note, \$511.67, and interest from the 16th January, 1870, when it fell due, until the 27th April, at seven per cent., \$9.90; and leave was reserved to the plaintiff to move to increase it on the second count to \$1598.10, if the Court should be of opinion that he was entitled to recover for the second and third instalments—that is, if the Court should be of opinion interest was in arrear at the commencement of the suit.

Speedy execution was granted to the plaintiff on the first count, without prejudice to his afterwards moving to increase it.

*R. Martin* obtained a rule *nisi* to increase the verdict to \$1598.10, or such larger amount of damages for the plaintiff as to the Court, under the circumstances, might seem meet, pursuant to leave reserved.

During this term, *Harrison*, Q.C., shewed cause. There is no averment in the declaration to shew that interest became due so as to make the remaining instalments due. The Act as to the short forms of mortgages is not sufficiently referred to to give the extended meaning, under 27-28 Vic., ch. 31, to the words used in the statute. The covenants are not numbered as they are in the forms of the statute, so as to connect one with the other. *Sterne v. Beck*, 32 L. J. Chy. 682; *Trust and Loan Company v. Drennan*, 16 C. P. 321; *Whitehead v. Walker*, 9 M. & W. 506; *Carlton v. Kenealy*, 12 M. & W. 139; *Hemp v. Garland*, 4 Q. B. 519, are authorities to shew that when it is claimed that a breach of a condition accelerates the payment of the whole principal, it should be alleged in the declaration. There is no averment in the declaration of interest in default.

*R. Martin*, contra. The interest accrues *de die in diem*, and every day there is a default. There being a default in the payment of the interest, then the principal is due: *Wilson v. Harman*, 2 Vesey Sen., 672, 673; *Fisher on Mortgages*, 2nd ed. 901; *Coote on Mortgages*, 3rd ed., 442; *Hicks v. Gardner*, 1 Jur. 541. *Martyn v. Clue*, 18 Q. B. 681, shews that a covenant to leave in repair is broken the instant the tenant leaves the land and the premises are out of repair. So here, the moment any interest is due the proviso operates, and the whole amount of the principal is due. If the provision as to default of payment of interest accelerating the payment of the whole principal does not come under No. 16 of the schedule to the Short Forms of Mortgage Act, it will apply under sec. 2 of the statute, and the words themselves operate as an agreement that the whole principal shall become due on default of the payment of the interest.

RICHARDS, C. J., delivered the judgment of the Court.

It seems strange if it was the intention of the parties that the whole of the principal should become due on default of paying any of the instalments, that it should not have been so provided in the mortgage; and it appears still more strange that the proviso for accelerating the payment of the principal should depend on the omission to pay the interest, instead of the instalment, when there is no interest payable under the mortgage until default in paying an instalment.

The case of *Sterne v. Beck*, in appeal, before the Lords Justices, as reported in 8 L. T. Rep. N. S. 588, overruling the decision of Vice-Chancellor Stuart, shews that when it is provided that in default of payment of an instalment the whole of the debt shall become due, the plaintiff, on such default, may recover the whole debt, and equity will not interpose.

The proviso in the mortgage is, that it shall be void on payment of the principal and interest after the same becomes due until paid at seven per cent. The object of this seems to be to shew that the mortgagee would have a right to hold his mortgage security until he was paid his principal debt, and the interest to accrue after it was due at the rate of seven per cent. per annum, instead of six, which would be the interest which would be allowed in the absence of the special provision. Then the payment was to be as follows: \$511.67 four months after the date thereof, \$523.34 eight months after the date thereof, and \$523.09 fifteen months after the date thereof, with interest on each instalment after it matures at the rate aforesaid until paid.

Then follows the covenant that he will pay the mortgage money and interest, and observe the proviso. According to the extended form of these words, so far as it is necessary to refer to them here, they are, that he will pay to the mortgagee, his heirs, &c., the said sum of money in the above proviso mentioned, with interest for the same as aforesaid, at the day and time and in manner above limited for the payment thereof.

The words in the expanded form, as to the proviso for payment of interest, are to the effect that it is expressly declared and agreed between the parties "that if any default shall at any time happen to be made of or in the payment of the interest money hereby secured or mentioned, or intended so to be, or any part thereof, then, and in such case, the principal money hereby secured or mentioned, or intended so to be, and every part thereof, shall forthwith become due and payable, in like manner and with the like consequences and effects, to all intents and purposes whatsoever, as if the time therein mentioned for the payment of such principal money had fully come and expired."

Taking the provisos and the covenant together, we think they are intended to apply when there is a specific default in the payment of the interest as such. The covenant speaks of the payment of the principal with interest at the day and time limited for the payment thereof. If, then, the instalment of the principal first due was paid on the day it became due, there could be no default in the payment of the interest. If the instalment were not paid on that day, then the default would be in the payment of that portion of the principal, and not of the interest. The covenant or agreement as to interest is after default of payment of that portion of the principal to pay interest at seven per cent. until paid. The plaintiff would not be compelled to discharge the mortgage until he received the interest at seven per cent. after default until paid.

The other proviso (No. 16) causes the whole principal to become due immediately in case any *default* shall be made in the payment of the interest secured by the mortgage. When was the default made in the payment of the interest? No time is mentioned for its payment, and no demand of payment is shewn. To avoid the alternative of all becoming due, would it be necessary for the defendant to tender the interest from day to day?

*Carlton v. Kencaly*, 12 M. & W. 139, cited by Mr. Harrison, was an action on a promissory note, payable by

instalments, containing a statement that the whole amount should become immediately payable on default being made in the payment of the first instalment. The declaration averred that the defendant made default in payment of the first instalment, and that he had not paid the amount of the note.

Here the declaration does not state that the defendant covenanted that in default of the payment of interest at seven per cent. after the instalment became due he agreed that the whole principal money should become due immediately, and averring that he had not paid such interest, and that in consequence the whole became due, and that he had not paid the same.

After reciting the proviso and inserting the one about the payment of the interest, he alleges that the defendant covenanted he would pay the mortgage money and interest and would observe the proviso for the payment thereof as aforesaid, but the defendant did not pay the same nor observe the said proviso. In what does he mean the defendant did not observe the proviso? Is it by not paying the interest, and that he thereby claims to sue for the whole? He does not say so. He is not bound to sue for the whole amount, and as it does not appear that he has done so under the present declaration, we think we may properly hold he cannot recover it.

Looking at the whole case, the form of the mortgage with its proviso and covenant, and the declaration itself, we think we ought not to enter the verdict for the plaintiff on the second count for the full amount of the principal money mentioned in the mortgage, and interest at seven per cent.

The mortgage purports to be made under the statute, and we see no reason why the words used in it should not have the interpretation given to them by the statute, though not numbered as they are in the schedule to the Act. That numbering seems to us to have been done merely to connect the short form of words used under that number with the expanded form under the corresponding number of the second column of the schedule.

*Rule discharged.*

## IN RE McDONALD ET AL. AND CATTANACH ET AL.

*Fence-viewers—Award—Right of Appeal—C.S.U.C., ch. 57, 32 Vic. ch. 46, O.*

The right of appeal to the Judge of the County Court against an award of fence-viewers, under 32 Vic., ch. 46, sec. 8, is not restricted to an award made under sec. 6, sub-sec. 2 of the Act, when the land benefited is in two municipalities, but extends to an award made by three fence-viewers under C. S. U. C., ch. 57, which the later Act amends and is made part of.

ON the 20th December, 1869, John B. Snyder, John McDonald, and Farquhar McLeod, (who appended after their signatures the words, "water-course viewers,") made an award in relation to a certain water-course in the township of Lancaster.

They recited in the beginning of the award that on the 26th of October, 1869, they had been legally called upon to examine and determine a water-course in dispute between Norman R. McDonald and Finlay Cattanach, and after being satisfied that all the parties interested were duly notified, they then proceeded to state what they did, and the conclusion they arrived at, and declared who should open or excavate the different sections of the water-course. They proceeded to tax a bill of costs, the larger part consisting of their own fees, the whole amount being \$45.75, \$42.25 being the fees. They then apportioned the amount to be paid by the owner of each lot to be benefited by the drain or water-course to be constructed and improved.

On the 17th January, 1870, a notice was given on behalf of Norman McDonald and others interested in the matter of an appeal made against the award, and stating that the 3rd of February, 1870, at 10 o'clock, a. m., was the time and place fixed for hearing the appeal, and that the evidence of all the parties interested must be produced at the same time and place. The notice was entitled, "In the County Court of the United Counties of Stormont, Dundas, and Glengarry."

A copy of the appointment of Geo. S. Jarvis, Esq., Judge of the County Court, of Thursday, the 3rd of February, to hear the appeal, was put in.

On the 5th of February a summons was obtained in Chambers, on the application of the respondents, calling on the appellants and the Judge of the County Court of the United Counties of Stormont, Dundas, and Glengarry, to shew cause why a writ of prohibition should not issue to prohibit the said judge from hearing the said appeal, or from further proceeding in the said appeal, and from making any order or direction therein, on the ground that the Judge had no jurisdiction to hear or proceed in the said appeal; and on the ground that the matters in question in the said appeal, and the water-course therein mentioned as affected, are situate in the township of Lancaster, and no appeal is allowed in case of lands wholly situate in one township; and that the said appeal is not within subsec. 2 of the seventh section of the Statute of Ontario, 32 Vic., ch. 46, and that there is no appeal in any other class of cases; and that the said appeal was not brought within thirty days after the award therein appealed from was filed with the Clerk of the Township of Lancaster; and why in the meantime proceedings on the appeal should not be stayed.

The case was argued before Gwynne, J. On the 21st April last he made his order discharging the summons, and his written judgment was produced on the argument of the rule. (a)

In Easter Term last *Bethune*, for Finlay Cattanach, obtained a rule *nisi*, calling on the appellants to shew cause why the order of Mr. Justice Gwynne should not be set aside, and why a writ of prohibition should not go to the Judge of the County Court of Stormont, Dundas and Glengarry, on similar grounds to those mentioned in the summons made on the 5th of February.

On the last day of Easter Term *Osler* shewed cause, and objected that the Judge had not been called upon to shew cause on this rule, and referred to the judgment of the learned judge in discharging the summons.

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(a) See the decision reported, 5 P. R. 288.

*Kerr*, contra, cited *Ferguson v. Corporation of Howick*, 25 U. C. R. 553; *Morris v. Mellin*, 6 B. & C. 446; *Bennett v. Daniel*, 10 B. & C. 500; *Daniel v. Bingham*, 4 Ir. L. R. 285; *Shaw v. Ruddin*, 9 Ir. C. L. R. 214: *Dwarris* on Statutes, 601; 2 Inst. 111.

RICHARDS, C. J., delivered the judgment of the Court.

I have carefully considered the different sections of the amending Act, and have compared them with the sections of the Consolidated Statute.

One of the principal objects of the amending Act undoubtedly was to extend the provisions of the Consolidated Statute so as to charge the lands of absentees and non-residents with a proportionate part of the expense of constructing ditches or water-courses.

Section 7 of Consol. Stat. U. C. ch. 57, seems to exclude the lands of non-residents from its operation, for it says: "When it is the joint interest of *parties resident* to open a ditch or water-course to let off the surplus water from swamps or low miry lands, in order to enable the owners or occupiers thereof to cultivate or improve the same, such several parties shall open a just and fair proportion of such ditch or water course, according to their several interests."

The amending Act of Ontario, 32 Vic. ch. 46, sec. 1, extends the provisions of that Act so far as they relate to water-courses to unoccupied and non-resident lands, and to the owners thereof, to the same extent as to occupied lands and the occupants thereof. The portion of the expenses chargeable to these lands is to be paid in the first instance by the township municipality; an account of the amount is to be transmitted to the County Treasurer, and the land against which the same is chargeable, and the County Treasurer is to charge the same against such land in the same manner as the wild land tax.

Section 6 provides for the case of the water-course being extended through another or adjoining municipality.

Sub-section 2 provides that if the lands in both municipalities are equally benefited in proportion to the extent of the work in each, the duty of deciding in what proportion the expenses shall be borne amongst the owners of occupied or unoccupied lands in each said municipality, and the proceedings provided by the said Act as amended by this Act, shall be taken and apply; but if the ditch does not benefit the lands in both municipalities in an equal degree, in proportion to the expense of the work in each, then the duty of deciding in what proportion the expense shall be borne by and amongst the owners of occupied or unoccupied lands in both the municipalities, shall appertain to six fence viewers, three from each of the municipalities, and the decision of such fence-viewers, or a majority of them, shall be binding, and shall be in duplicate, and one duplicate is to be transmitted to the Clerk of each municipality. The subsequent proceedings as provided by the former Act as amended by the later Act, shall be taken and apply.

The conclusion in sec. 9 of the Consolidated Statute as to the decision of the three fence-viewers is, "and such determination or award shall be binding on the parties thereto."

The seventh section of the amending Act provides that "it shall be competent for any party affected by any decision of *such* fence-viewers to appeal to the Judge of the County Court within which the said land is situate, against such decision."

Mr. Kerr in his argument contended that *such* fence-viewers meant the *six fence-viewers* under sub sec. 2 of sec. 6, and not the three fence-viewers under the Consolidated Act. But the first part of the sub-section provides for the decision being made by the three fence viewers of each municipality in the manner provided by the Consolidated Statute, as amended by that Act, and if "*such* fence-viewers" is to apply to that sub-section generally, it will apply to the decision of the *three*. It would seem strange if the decision of the *three* fence-viewers in proceedings

under the Consolidated Statute as amended should be subject to appeal, whilst the decision of the same class of men, or perhaps the same men themselves, in a precisely identical proceeding, would not be subject to appeal.

The second sub-section in effect provides that when the drain or water-course extends into two Townships and both are equally benefited in proportion to the expense of constructing the drain in each, then the proportion of the expenses to be borne by each land owner in each municipality is to be ascertained by three fence-viewers, in the same way as if the drain was wholly within such municipality. The decision of these three under sub-section 2 and section 7 of the last Act would be a decision of *such fence-viewers*. When the same viewers make a similar decision with regard to drains wholly within their own Township, but which had not extended into the adjoining Township, it is urged their decision is not subject to appeal.

We do not think we are called upon to limit the right of appeal as we are asked to do, on the construction of the seventh section itself. The words "*such fence-viewers*" may well apply to the fence-viewers notified to decide in the matter, and who have made a decision. When, however, we consider that by the eighth section of the last Act it is declared that it shall be read as if it was a part of the Act thereby amended, it seems to settle the matter. If then the seventh section is read as a part of the Consolidated Statute, it would seem to put it beyond a reasonable doubt that the right of appeal to the County Judge applies to a decision of the fence-viewers under it, as well as to those made under the amended Act.

We all think that the order of Mr. Justice Gwynne is right, and that the rule to set it aside must be discharged with costs.

*Rule discharged.*

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## DAVIS ET AL. V. VANNORMAN.

*Ejectment against a mere trespasser—Notice under C. S. U. C., ch. 27, sec. 17—Probate of will, effect of as evidence—C.S.U.C. ch. 32, sec. 17—Tax sale—33 Vic. ch. 23, O.*

The plaintiffs in ejectment, executors and trustees of S. claimed title by a sale under execution against C. It appeared that the patent for the land issued to one Y., of the Township of Fredericksburgh, in 1810. There was no deed proved from Y., but in 1834 one D., of the same township, conveyed to C. the whole lot, and it was shewn that the patent had been in D.'s possession, and in that of C., whose papers had been burned. No claim had been made by or under T., but no possession had been taken of the land until 1847, when the lot was sold for taxes and purchased by C., who paid the taxes and exercised acts of ownership until the defendant entered as a trespasser.

*Held*, a case within secs. 17 and 18 of the Ejectment Act, C. S. U. C., ch. 27: that the plaintiff, under sec. 18, was a person entitled in justice to be regarded as the proprietor of the land, but unable to shew a perfect legal title from a cause not within his power to remedy by due diligence; and that the defendant being a mere intruder and stranger to the title, and having received a notice to shew what legal right he had, under sec. 17, was not at liberty to take objections to the plaintiffs' title.

Where a probate is used as evidence, under C. S. U. C. ch. 16, it is evidence of the testator's death, as well as of the will.

*Semble*, that several objections taken to the tax title, and set out below, were cured by the 33 Vic. ch. 23, O.

EJECTMENT for the west half of lot 7, in the 14th concession of the Township of Huntingdon.

The plaintiffs claimed title as the executors and trustees under the last will and testament of Hosea Ballou Smith, who claimed title by deed poll from George Taylor, Sheriff of the County of Hastings, to the said Smith, as the purchaser under certain writs of *fieri facias* and *venditioni exponas* and *fieri facias* for residue, which issued against the lands and tenements of David Roblin, M. P. Roblin, and John Chamberlain, in the suit of the said Smith against the said David Roblin, M. P. Roblin, and John Chamberlain, out of the Court of Common Pleas at Toronto.

The defendant appeared and defended for the whole of the land.

The cause was tried before Galt, J. at the last autumn assizes at Belleville.

The plaintiffs, nine days before the trial, served a notice on the defendant personally, under the Ejectment Act, Consol. Stat. U. C. ch. 27, sec. 17, setting out how the plaintiffs claimed the land, which was a repetition of their notice of claim above mentioned, and concluding, "and that you will be required to shew upon the trial of this cause what legal right you have to the possession of the premises."

The facts and evidence of title, so far as it is necessary to state them, were as follows :

The Patent for the whole of lot 7, in the 14th concession of Huntingdon, issued on the 16th of March, 1810, to Peter Young, of the Township of Fredericksburgh, son of a U. E. Loyalist, in fee.

Deed, dated 18th October, 1834, from James Detlor, of Fredericksburgh, to John Chamberlain, of the Township of Richmond, in fee, of the whole lot, consideration £100, not registered.

Exemplification of judgment recovered by Hosea Ballou Smith against D. Roblin, M. P. Roblin, and John Chamberlain, in the Common Pleas, on the 16th January, 1863, for \$967.86, damages and costs.

On the same day a *fiery facias* issued from the office of the Deputy Clerk of Stormont, Dundas, and Glengarry, where the judgment was entered, against the goods and chattels of the said judgment debtors, directed to the Sheriff of Frontenac, Lennox, and Addington. It was returned no goods by Thomas A. Corbett, Sheriff.

On the 21st of January, 1863, a *fiery facias* against the lands and tenements of the said judgment debtors was issued from the same Deputy's office, directed to the Sheriff of Hastings, which was renewed from the 13th of January, 1864. It was returned lands on hand to the value of \$5, and no other lands as to residue.

Upon this, on the 31st of August, 1864, a *venditioni exponas* and *fiery facias* issued against lands and tenements for the residue from the same office, directed to the Sheriff

of Hastings; it was returned, land on hand sold for \$30, and no lands as to residue.

Deed dated 2nd November, 1864, from the Sheriff of Hastings to Hosea Ballou Smith, of the west half of lot 7, in the 14th concession of Huntingdon, in fee, for \$30, sold under the *fieri facias* against lands and the writ of *venditioni exponas* and *fieri facias* before mentioned, registered 1st September, 1865.

Warrant from the Clerk of the Peace of Hastings, dated 26th December, 1844, to the Sheriff of Hastings, to sell various lands for arrears of taxes, and among them the whole of lot 7, in the 14th concession of Huntingdon.

No objection was made to the advertisements. A certified copy of memorial was put in, dated 4th June, 1861, executed by J. W. Dunbar Moodie, then Sheriff of Hastings, setting out at full length the deed he had made on the 18th January, 1847, to John Chamberlain, in fee, for the sum of £6 17s. 6d., as the price paid for lot 7, in the 14th concession of Huntingdon, on its sale under the said warrant for arrears of taxes.

The land was described as follows: "being composed of two hundred acres of the rear part of lot number seven in the fourteenth concession of the Township of Huntingdon, should the said lot contain more than two hundred, and of the whole of said lot should the said lot not contain more than two hundred acres." This was registered on the 11th June, 1861.

Receipt of County Treasurer for taxes, 11th March, 1857, for £3 5s. 9d., on the whole lot, up to the 31st December, 1856, stated to have been paid by Job Lingham.

Receipt, 15th September, 1864, from the Treasurer, for \$9, from H. B. Smith, on the west half of lot 7, in the 14th concession of Huntingdon, for taxes for 1857, 1860, and 1861.

Receipt, 3rd February, 1868, from the Treasurer for taxes, for \$16 10, on the west half lot aforesaid, from the 1st January, 1864, to the 31st December, 1866, paid by H. B. Smith.

Probate of last will and testament of Hosea Ballou Smith.

The will was dated 5th August, 1865, made and executed in Lower Canada, signed by the testator, and by three Notaries Public—of which a certified copy was registered in Hastings, on the 21st March, 1870.

Probate in Upper Canada, granted by the Surrogate Court of the County of Wentworth, to the plaintiffs, on the 29th September, 1868, reciting the testator's death to have happened on or about the 15th of July, 1868.

The plaintiffs were the trustees and executors under the will, and it was not disputed that they had title, if the testator himself had, to the land in question.

A notice was proved, dated 20th September, 1870, given by the plaintiffs' attorney to the defendant's attorney, of intention to give in evidence as proof of the devise to the plaintiffs the probate of the last will and testament of Hosea Ballou Smith, deceased, stamped with the seal of the Surrogate Court of the County of Wentworth, granted to the plaintiffs.

The deed from the sheriff to Moodie was not produced, or proved otherwise than by the certified copy of memorial: this last-mentioned deed was supposed to have been destroyed by the same fire. Chamberlain sold the east half of the lot to Lingham, in 1861. He did nothing with the lot till that time, it was a wild lot till then. Defendant went into possession of the west half in question about the year 1866. He asked Lingham who owned it, as he wanted to buy it, and Lingham referred him to Mr. Chamberlain as the owner of it.

It appeared at the trial, also, that the deed to Chamberlain from Detlor was found with one Rowe, a son-in-law of Chamberlain's, after Chamberlain's death, and that the Patent of the land was at one time in Chamberlain's possession: that Chamberlain was once burned out, and lost a number of deeds of land by the fire. No deed from Young, the patentee, to Detlor, was proved to have existed, nor any memorial of it. A verdict was rendered by the jury for the plaintiffs, leave being reserved to enter a verdict for defendant or a nonsuit.

*George D. Dickson* obtained a rule *nisi* accordingly, on the following grounds :

1. There was no evidence of any grant of the fee of the lands from the patentee to James Young, or to any other person.

2. There was no writ of *feri facias* against goods issued to the County of Hastings, before the *feri facias* against lands issued under which the land was sold.

3. If the exemplification of judgment roll prove the return of the *feri facias* against goods, such return is dated the 8th of May, 1863, and the *feri facias* against lands, under which the land was sold, was issued in January of the same year, and cannot be supported by the writ against goods being returned after it.

4. There was no evidence of the death of the testator, Hosea B. Smith, the probate of will being only evidence under the statute of the contents of the will.

5. The will so proved was not proved to have been attested so as to pass real estate in Upper Canada.

6. The memorial signed by the former sheriff, Moodie, which was produced, was not evidence of the contents of the deed from him to Chamberlain.

7. If such memorial prove anything, it shews that the conveyance of which it is the evidence is void for uncertainty in the description as to the parcel or quantity of land, an uncertainty which was not removed by other evidence.

8. The memorial also shews that the sheriff did not proceed in the sale as required by the Act 6 Geo. IV. ch. 7, or by the Statute in that behalf, and did not designate what part he offered for sale; and the description of the land sold is not in accordance therewith, nor was the sale made as required by the Statutes then in force.

9. The lands were sold within six months after the receipt of the warrant by the sheriff.

10. The warrant is not sealed, and does not describe the land to be sold.

11. It was not shewn that Thomas A. Corbett, who

purports to have made the return of the *fieri facias* against goods, was the sheriff to return it, nor that it was directed to him, nor that he was sheriff at all, nor that there was any return at all.

*Henderson*, of Belleville, shewed cause to the rule.

The defendant being a mere squatter, and having been served with notice under the Statute to prove his title, should not be permitted to raise any of the objections he had taken to the plaintiffs' title. The plaintiffs claim by purchase under an execution against Chamberlain and others at the suit of Hosea B. Smith, to whom the sheriff made the deed as proved at the trial: *Armstrong v. Little*, 20 U. C. R. 425. But there was evidence at any rate as against the defendant that Young, the patentee, had conveyed the land to Detlor. The fact of Chamberlain, the grantee of Detlor, having possession of the patent was evidence that he had got it rightly. The existence of such a deed being thus sufficiently proved, its loss was reasonably accounted for by or at the fire which had happened at Chamberlain's house, when a deed which Chamberlain was known to have had, the one from Sheriff Moodie, was destroyed, with many other deeds. As to the presumption in favour of such a deed, he referred to *Doe dem. Sullivan v. Read*, 3 U. C. R. 293; *Covert v. Robinson*, 24 U. C. R. 283; *Eades v. Maxwell*, 17 U. C. R. 173; *McDonald v. Prentiss*, 14 U. C. R. 79; *Doe dem. Hammond v. Cooke*, 6 Bing. 174; *Tay. Ev.*, 5th ed., 147. The second and third objections have been abandoned by defendant's counsel. As to the fourth objection, the probate put in is evidence of the death of testator. After notice given of intention to use it, and no notice given of any intention to oppose it, defendant cannot oppose its being used as evidence of the will, and so of necessity of the death of the person who made the will.—*Tay. Ev.*, 5th ed., 1440; *Consol. Stat. U. C.*, ch. 16, sec. 51; ch. 32, secs. 9, 11; *Wms. Exrs.*, 6th ed., 320. As to the fifth objection, the attestation is sufficient in form. As to the sixth objection, there was evidence of a deed from Sheriff Moodie to Chamberlain

having been seen before the fire; the presumption was that it was destroyed by the fire; the memorial was secondary evidence of it, in aid of the primary evidence before mentioned; the registration of it was duly proved by the subscribing witness. As to the seventh objection, the alleged insufficiency in the description of the land is cured by the Ontario Act, 33 Vic., ch. 23, sec. 2, for Hosea B. Smith had paid more than eight years' taxes. The statute would be a defence against a *bonâ fide* claimant; it is much more an answer against a mere squatter. The eighth objection may be answered in like manner.—See also *Hamilton v. McDonald*, 22 U. C. R. 136; *Cotter v. Sutherland*, 18 C. P. 357. As to the ninth objection, there is no evidence of it; but if it be true, the Tax Title Act will cover it also. The tenth objection is plainly not correct, for the warrant is sealed; it is now in Court and can be seen; but if it were not sealed, that too would be cured by the statute. The eleventh objection was abandoned by the defendant's counsel.

*Dickson* supported the rule. The plaintiffs not only ask for the deed to Detlor to be presumed, but its contents; but Chamberlain's subsequent purchase at the sale for taxes defeats the presumption the plaintiffs ask to be made, that he had in fact a prior title. There were no acts of ownership by Chamberlain on or with respect to the land till after he got the deed from the sheriff, which it is said he had.

As to the probate of will, the statute dispenses only with the production of the original will, and of the witnesses to prove it. If the original had been used, the testator's death must have been proved, why not then when the copy is used in its stead? the statute never meant to do away with proof of the death; that fact must still be proved, as heretofore. It was intended only to dispense with the production of the witnesses to the will: C. S. U. C. ch. 32, secs. 9, 11, 12; ch. 16, sec. 51; *Barraclough v. Greenhough*, L. R., 2 Q. B. 619. The fifth objection is of the same character; Probate applies under the Evidence

Act only to personalty : In the goods of *Jane Barden*, L. R. 1 Prob. & Div. 325. 6. The memorial of the sheriff's deed executed by Chamberlain, the grantee, does not prove the existence of the deed it purports to refer to. 7 and 8. The uncertainty and insufficiency of the sheriff's deed for taxes defeats that title. What land was sold ? Two hundred acres of the rear part of the lot, if it contained more than 200 acres. No election by the purchaser can make the deed sufficient, for there can be no election under the deed of a public officer disposing of the property against the will of the owner : *Doe dem. Notman v. McDonald*, 5 U. C. R., 321 ; *Doe dem. Miller v. Tiffany*, 5 U. C. R. 89 ; *Fraser v. Mattice*, 19 U. C. R. 150 ; *Cayley v. Foster*, 25 U. C. R. 407 ; *Knaggs v. Ledyard*, 12 Grant 320. The Tax Title Act does not apply to this case.

WILSON, J., delivered the judgment of the Court.

Of the eleven objections originally taken, the defendant's counsel abandoned the 2nd, 3rd, and 11th, and he did not refer on the argument to the 9th and 10th objections.

The first objection which we take up is not any of those which the defendant has raised, but one which the plaintiffs have made against him ; whether he, a mere squatter, without any title or colour of title, when setting up no right, and when called on to prove what right he has to the land, can litigate, by these multifarious and critical niceties, the strict title to the land at all ?

The Ejectment Act, Consol. Stat. U. C., ch. 27, under the heading of " Vexatious Defences," enacts, sec. 17, " It being desirable in actions of ejectment brought against persons who are merely intruders, not to prevent claimants from recovering land to which they have just claim, on account of some want of technical form in their title, or some imperfection not affecting the merits of their case, and of which mere strangers to the title having no claim or colour of legal claim to the possession should not be permitted to take advantage ; the claimant or his attorney in any action of ejectment may serve a notice upon the defendant in words

or to the effect following: 'Take Notice that I claim the premises for which this action is brought as, &c., and that you will be required to shew upon the trial of this cause what legal right you have to the possession of the premises.' "

Sec. 18. "If upon the trial of such ejectment the evidence of title given by the claimant satisfies the Court and jury that he is entitled in justice to be regarded as the proprietor of the land, \* \* \* but that he cannot shew a perfect legal title by reason of some want of legal form in some instrument produced, or by reason of the defective registration of some will or instrument produced, or from any cause not within the power of the claimant to remedy by using due diligence, the jury, under the direction of the Court, may find a verdict for the claimant, unless the defendant, or his counsel, upon being required by the other party so to do, gives such evidence of title as shews that he is the person legally entitled, or that he does *bonâ fide* claim to be the person legally entitled to the land, by reason of the defect in the title of the claimant, or that he holds, or does *bonâ fide* claim to hold, under the person so entitled."

This defendant is a person who is "merely an intruder" and a "mere stranger to the title, having no claim or colour of legal title to the possession," and he makes what is properly described as a "vexatious defence."

Who are the plaintiffs? They claim under Chamberlain and his title is perfect if Peter Young, the patentee, ever conveyed the land to Detlor.

The patent to Young, issued in 1810. He is described as of the Township of Fredericksburgh; and James S. Detlor, a person well known and of the same Township, in 1834 is found in possession of the patent claiming the land, and he conveyed it to Chamberlain for £100. Chamberlain is a man who was also well known, and he, after he became the possessor of the patent and the purchaser of the land, held it for many years and paid the taxes upon it. From 1810 to the present time Peter Young has not, nor has any

one claiming from him, but Detlor, Chamberlain and those claiming under Chamberlain, ever interfered with or claimed title to the land until the defendant vexatiously, and as a stranger to the title, and as a mere intruder, entered about four years ago.

There is no strong evidence of the existence of a deed from Young to Detlor. It is not necessary to prove the actual existence of a deed in all cases, for a deed may be presumed, as when the possession of the land is consistent with the fact of there being such a deed. Here, however, no possession was taken, nor any act done upon the land; taxes were not even shewn to have been paid by Detlor or Chamberlain until after Chamberlain's purchase at the Tax Sale, some time between 1844 and 1847.

The length of time which has elapsed from 1810 until the defendant took possession in 1866 may be relied on as some slight evidence that Peter Young had conveyed his title, as neither he nor any one claiming under him, but Detlor and those claiming under Detlor, have ever claimed title to it since then.

The possession of the patent in and before 1834 by Detlor points to him as the person who got the conveyance, and *his* conveying the land in 1834 and transferring the patent to Chamberlain strengthens that presumption. So the long period that elapsed between 1810 and 1845, or thereabouts, the time of the sale for taxes, and before any other title than the one under the patent arises, is evidence of a like nature: *Covert v. Robinson*, 24 U. C. R. 282; *Eades v. Maxwell*, 17 U. C. R. 179.

And we think, if any effect is to be given to the statute at all as against a mere stranger and intruder, it must be given just in those cases where the claimant's strict title fails from a cause not within his power to remedy, and when he is entitled in justice to be regarded as the proprietor of the land.

If Chamberlain had not bought the land from the Sheriff, and if he had sold the east half to Lingham, as under the deed he had from Detlor, that is, either before

or without any deed from the Sheriff, and had paid taxes as under the same title, so that he had plainly interfered with and exercised such acts of ownership over the land, then, I think, after the long unasserted right of Young, or of any one under him claiming adversely to Chamberlain, a deed in confirmation of his right might have been presumed to have been made by Young to Detlor, even as against Young himself, under certain circumstances.

Chamberlain's purchase of the land for taxes, it is true, is not the act of a person having the legal estate. It is rather the act of a person who, knowing of some infirmity in his title, has adopted this expedient of curing, correcting, or overcoming it. Still he may have done it simply because he had lost the deed to Detlor, and under the idea that his new title would make his claim as good as his former claim was before he lost the deed. His conduct in this respect is not conclusive evidence that there was not such a deed to Detlor, though it is evidence that there was not.

Now this defendant should not be allowed to intrude himself, and raise a discussion, first of all, whether there ever was such a deed, and secondly, how far Chamberlain's subsequent purchase is to operate against the presumption of there having been such a deed.

Chamberlain, as a fact, did, for twelve or thirteen years before he bought from the sheriff, claim in right of such a deed. When he bought from the sheriff his purpose may have been to re-establish his title, which he may have supposed he had lost by the loss of his deed, or he may have acted from some other cause not inconsistent with his being "entitled in justice to be regarded as the proprietor of the land."

From that time, that is, since 1846 or 1847, he and those claiming under him have paid the taxes, and are the only persons who have ever, until the defendant's intrusion, exercised acts of ownership over the land.

In my opinion, it would be a most mischievous and vexatious proceeding if this mere intruder and stranger could, notwithstanding the provisions of the statute, hold

the plaintiffs at defiance because they had not proved the very strictest legal title against the real owner, and keep the land himself because they had not done so, when he has not a particle of right and does not pretend that he has, but holds by invasion and wrong, without any kind of excuse or justification.

This defendant has no right against such a title as the plaintiffs have shewn to supplant them, and to put them to the proof of their rights.

If the deed in question had been fully proved, the plaintiffs would have made out a strictly legal claim against Peter Young himself, and they would not have required the aid of the statute.

They are not bound to establish a perfect title against the defendant, for that would be to put the mere intruder, notwithstanding the provisions of the statute, on the same footing as the person having the strict legal title.

What they have to do is to "satisfy the Court and jury that they are entitled in justice to be regarded as the proprietors of the land, but that they cannot shew a perfect legal title from a cause not within their power to remedy by using due diligence;" and that is the measure of their proof. Upon this they are entitled to recover, unless the defendant, who has been so served with notice to shew what legal right he has, is able to prove one.

It is quite clear the plaintiffs have shewn that they are *in justice* entitled to be regarded as the proprietors, and that the alleged imperfection is not one which they can in any manner remedy.

If they were withholding proof which by using due diligence they could procure, they would be entitled to no favour, for the statute was never meant to help those who proved their title imperfectly when by using due diligence they could have remedied the deficiency, but to aid those who, having proved an imperfect title, could not by any diligence remedy it, provided they established, to the satisfaction of the Court and jury, that in justice they were entitled to be regarded as the proprietors.

I have not considered the absolute, I mean the strict legal, rights of the plaintiffs, for the defendant cannot, as a usurper, put them to the proof of them. It is sufficient that they have proved a case under the statute to require the defendant to controvert it by a better title in his favour.

This case might have been stated more shortly than it has been, but the full objections have been detailed and the whole arguments upon them have been given, for the purpose of shewing in what way and to what extent a mere intruder may set up a vexatious defence; and that it might appear how unjust it would be to permit him to speculate so freely on his possession against the long-standing claim and rights of his opponents; and that it may appear if he can raise such objections he is doing just what the rightful owner (assuming that there is such a person as against the plaintiffs) could do, and just the thing which the statute declares the intruder shall not do, and which would be equivalent to a repeal of the statute if he were permitted to do.

The law always leans strongly against mere wrong-doers. Almost any possession is a sufficient title to enable the plaintiff in ejectment to recover against a wrong-doer: *Doe dem. Hughes v. Dyball*, 3 C. & P. 610; *Doe dem. Humphrey v. Martin*, Car. & Marsh. 32.

If Chamberlain can be said to have had possession, and we are not satisfied he may not, for he had sold half the lot to Lingham and had paid the taxes for many years, then there was a sufficient possession, considering the nature of the property, as against a mere wrong-doer: *Jefferies v. Great Western R. W. Co.*, 5 E. & B. 802; *Sutton v. Buck*, 2 Taunt. 302; and the cases before cited. And if the Sheriff's deed for taxes be proved sufficiently, and it is said there was evidence of it independently of the proof afforded of it by the memorial, the objections to the deed raised by the seventh and eighth exceptions will probably be found to be cured by the Tax Act.

The insufficiency of the description of the land sold may be also cured by averment or proof that this lot did not ex-

ceed 200 acres, in which case the conveyance is of the whole lot, and not therefore objectionable.

Then as to the probate. We have no doubt its production is evidence of the testator's death, for it is evidence of the *validity* of the will, as well as of the contents, and the will (if it can be called a will) has properly no validity in the maker's lifetime. The will was well attested. The attestation is lengthy, but it is sufficient.

We refer generally to the exceptions, merely to show they might not be found to be insurmountable if they had to be considered.

In our opinion the plaintiffs proved a claim which they could not by due diligence remedy, which "in justice entitled them to be regarded as the proprietors of the land," and the defendant was not at liberty as "a mere intruder" and "a mere stranger to the title, having no claim or color of legal claim to the possession," to take any of the objections in question until and unless he shewed he was "the person legally entitled to the land by reason of the defect in the title of the claimants, or that he holds or does *bonâ fide* claim to hold under the person so entitled;" and that he did not do, nor attempt to do, nor pretend that he could do.

The rule will therefore be discharged.

*Rule discharged.*

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## MCBRIDE V. THE GORE DISTRICT MUTUAL FIRE INSURANCE COMPANY.

*Insurance on grain—Condition—Construction—Other insurance not notified—  
Warehouse receipts—Owners.*

Where a policy was made subject to the conditions endorsed thereon, one of which was "Insurance subsisting or effected with other Companies must be notified to the Board, and if approved of, to be indorsed on the policy and signed by the Secretary." *Held*, that this was a condition precedent, and non-compliance with it a bar to the action, though it did not so expressly provide.

The defendants having proved their plea under this condition, the plaintiff contended that it did not bar the action. Leave was reserved to move for a nonsuit on this ground, and the plaintiff had a verdict, there being another issue on the record. *Semble*, that a verdict should have been entered for defendants on the plea, and the plaintiff left to move for judgment *non obstante*, for that there cannot be a nonsuit while another issue stands in favour of the plaintiff on the record.

Another condition provided that property must be insured in the names of the owners. It appeared that the policy was on grain insured in the name of the plaintiff, who had given warehouse receipts for it, endorsed to certain banks. *Per Wilson, J.*—Such banks were the owners, by virtue of these receipts, not the plaintiff, and the condition was broken.

ACTION on a policy dated 26th of January, 1870, for \$2,000, on the plaintiff's stock of grain, pork, butter, hides, and skins, contained in a frame building situated on the south side of Mill Street, in Elora.

The policy was made subject to the conditions of insurance contained on the back of the policy and the By-laws of the Company.

A loss by fire was alleged to have happened to the amount of \$1513 25, of which notice and proof were duly given.

The second plea set out the following condition endorsed on the policy, and which policy was made subject to the said condition, and to all the other conditions indorsed on the policy :—

"Insurance subsisting or effected with other companies must be notified to the Board, and if approved of, to be indorsed on the policy and signed by the Secretary;" and it averred that at the time of the issuing of the policy sued

on there was subsisting another insurance on the same property with the Queen Insurance Company, for the sum of \$1,000, and it was the plaintiff's duty to have notified the defendants of the same, &c., &c., yet he did not do so.

The fourth plea set out the following condition endorsed on the policy :—

“Property must be insured the names of all the owners, and the applicant must state the interest of each owner, except in case of property held in trust or on commission, which must always be insured as such, otherwise the policy will not cover such property; and in case of loss the names of the, respective owners shall be set forth in the preliminary proofs of such loss, together with their respective interest therein. Goods in storage must be specially insured.” And it averred that at the time of the issuing of the policy, and subsequent thereto, the property was not insured in the names of all the owners thereof, nor was the interest of each owner stated in the application for insurance, and that the property was not held in trust or on commission.—Issue.

The cause was tried before *Morrison*, J. at the last Guelph assizes.

The following evidence is alone material :—*Nathaniel Higginbotham*, a witness called for the plaintiff, said : “I was in plaintiff's warehouse every day; I rented a portion of it; I was in it three days before the fire; in my judgment there were then over 10,000 bushels of barley; I granted two receipts for 7,000 bushels of barley, and one for 1,300 bushels of peas; I granted them as plaintiff's warehouseman, and I am fully satisfied there were 10,000 bushels.”

In cross-examination he said, “I occupied the lower part of the building, and stored whiskey, &c., there; I have had possession for five or six months previous to my granting the warehouse receipts, and I examined the grain before granting the receipts; I had a portion of the building and access to the rest; I was familiar with the rooms and bins \* \* \* I saw the grain myself, and I told the Agent of the Bank that I did so; I got no commission; I merely did it to assist the plaintiff.”

The defendants then put in the affidavit of the plaintiff made for and given to the defendants when he applied for payment of his loss.

It stated that at the time of the fire there was no other insurance on the property than two policies in the Queen Insurance Company for \$3,000, and \$4,000 in the Commercial Union Assurance Company—that is, a policy for \$2,000, and an interim receipt of the 3rd February, 1870, which entitled him to another policy, which he has since got, for \$2,000, from the last-named Company, which last-mentioned insurance was in lieu of a policy for \$2,000 which the plaintiff before then had in the Home Insurance Company, and which had expired.

The policy of the defendants stated that at the time of the granting it the plaintiff had the following insurances then subsisting:—

In the Queen.....	\$2,000
In the Home.....	2,000
In another Company.....	2,000
	<hr/>
	\$6,000

The additional insurance made on the 3rd of February, in lieu of the expired policy of the Home, left the amount of money secured by insurance just the same as matters were when the defendants issued their policy. But the insurance by two policies in the Queen Insurance Company to the amount of \$3,000 shewed the insurance with that office had been increased \$1,000 beyond what it was at the time of the making of the defendants' policy. The result was, that while at the making of the policy sued on the other insurances were \$6,000, at the time of the fire they were \$7,000.

Defendants' counsel contended that on this state of facts they were entitled to succeed on the second plea.

The plaintiff's counsel urged that the condition set forth in the second plea did not avoid the policy sued on, although the plaintiff had broken it.

Leave was thereupon reserved to the defendants to move to enter a nonsuit on that ground, if the Court should think them entitled to succeed. The case then proceeded.

Mr. Kingsley, the Manager of the Merchants' Bank at Elora, said he had a warehouse receipt given in December by Mr. Higginbotham, as warehouseman, to the plaintiff, for 1,300 bushels of peas, and endorsed by him to the Bank, in security for a note of \$500, which fell due about the 26th of February, or about fourteen days after the fire.

Mr. Sandilands, the Manager in Guelph of the Bank of Commerce, said he held two warehouse receipts for barley in security for notes discounted for the plaintiff; he got them, he thought, in October and November.

Mr. Newman, the Agent of the Bank of Montreal at Elora, said he received a warehouse receipt signed by Higginbotham in the plaintiff's favour, for barley; he thought the one he then had was not given by Higginbotham.

At the close of the case the defendants' counsel contended, that as the Merchants Bank were shewn to have held a warehouse receipt on some of the property in question, and so to have had an ownership in it, the defendants were entitled to succeed on the last plea, because that fact had not been disclosed to the defendants.

Leave was reserved to defendants to move in like manner as to that point.

The jury found for the plaintiff, and assessed the damages at \$1,384.

In Michaelmas Term last, *C. A. Durand* (of Galt) obtained a rule calling on the plaintiff to shew cause why the verdict should not be set aside and a nonsuit entered, pursuant to the leave reserved, or why a new trial should not be granted, because the verdict was contrary to law and evidence, and for the misdirection of the learned Judge, who directed the jury that the further insurance did not avoid the policy sued on, and that the warehouse receipts

endorsed to the several Banks did not constitute them owners of the grain specified in the receipts, so as to require their interest to be stated in the application for insurance.

*J. H. Cameron*, Q. C., shewed cause. The condition in the policy does not avoid the policy on the insured effecting another uncommunicated insurance. The 28th section of the Insurance Act, Consol. Stat. U. C. ch. 52, applies only to double insurances on houses or buildings, and not to such a policy as this is, on goods only.

Then as to the last plea, the Banks are not shewn to have had an interest of any kind in the grain; they claimed under Higginbotham's receipts, and it was shewn he was not a warehouseman at all; his receipts therefore conferred no interest. If they did, it was only an interest which made the Banks pledgees, and not owners, and it was only the names and rights of owners which the insured had to communicate to the defendants; the Banks were not owners.

*Durand* supported the rule. The second plea was proved; the plaintiff swears to the other policies in his claim papers: *Greaves v. The Niagara District Mutual Fire Ins. Co.*, 25 U. C. R. 127; *Mulvey v. The Gore District Mutual Ins. Co.*, 25 U. C. R. 424; *Garrett v. The Provincial Ins. Co.*, 20 U. C. R. 200; *McFaul v. The Montreal Inland Ins. Co.*, 2 U. C. R. 59. The condition is clearly a condition precedent: *Mason v. Harvey*, 8 Ex. 819; *Horseley v. Ward*, 6 T. R. 710; *Bruce v. Gore District Mutual Ins. Co.*, 20 C. P. 207. As to the fourth plea, the plaintiff was not the owner. *Clark v. The Western Assurance Co.*, 25 U. C. R. 209, goes to shew that the insured must possess the entire control through the whole period.

WILSON, J., delivered the judgment of the Court.

The first question is whether the second plea, which was proved, is a bar to the action?

It is founded on the seventh condition endorsed on the policy, which declares that "Insurances subsisting or

effected with other companies must be notified to the board, and if approved of to be endorsed on the policy and signed by the secretary."

The policy also, as the plea avers, provides "that this insurance shall at all times and under all circumstances be subject to the conditions of insurance contained and set forth on the back of this policy, and to the by-laws of the said company."

It is not provided expressly that the policy shall be avoided in such a case, and the insurance being on goods it is not within the 28th section of the statute, which makes a double insurance on houses and buildings voidable at the election of the directors.

The question must be settled by the general law applicable in such cases.

Here we may say that the question arises in a rather unusual way.

The defendants' counsel moved for a nonsuit at the trial, after the defendants had verified their plea, and he renewed his motion at the close of the case. The motion was refused, but leave was reserved to the defendants to apply to the Court to enter a nonsuit, if the Court on examination of the evidence should be of opinion the nonsuit should have been granted.

In our opinion the plea was proved, and whether it be a full bar or a good bar was and is at present of no consequence. The defendants were entitled to have a verdict entered thereon in their favor, but not to a nonsuit.

The plaintiff cannot properly be asked by the defendants to be nonsuited unless the plaintiff has failed to make out his own case. When he fails in his action only by reason of an issue being proved against him, the determination of the suit should properly be by a verdict pronounced on the issue. The plaintiff, however, in that case, and every other case, before the verdict is given by the jury, may elect to be nonsuited.

If a verdict had been entered on it for defendants the plaintiff would have been obliged to move for judgment

*non obstante veredicto*, which would have been the proper course if he contended the plea, as he has contended on the argument, is not a perfect bar to the action.

As the case now stands a verdict has been rendered on the issue contrary to the facts, and if a nonsuit be entered the plaintiff will be precluded from testing the sufficiency of the plea, by carrying the case into Error or Appeal.

We cannot help that. We must dispose of the case as it has been left to us, either by entering a nonsuit if the policy has been defeated by the double insurance pleaded, or by leaving the verdict as it is, if the plaintiff, notwithstanding the truth of the plea, is entitled to recover. We are thus in a very informal way deciding the case as on a motion *non obstante*.

The question then is, Is the seventh clause in the nature of a warranty or a condition precedent, so that the non-observance of it avoided the policy, or is it a stipulation merely, for the breach of which a cross action can be brought against the plaintiff?

In *Mason v. Harvey*, 8 Ex. 819, the condition endorsed on the policy, that in case of fire the assured should within three months deliver to the secretary of the company full particulars of the loss, was held to be a condition precedent to the bringing of the action by the assured for his loss.

The Court said if it were otherwise "a party might lie by for four or five years after the loss, and then send in a claim when the company perhaps had no means of investigating it."

We have construed this condition in the same manner in many cases in this country, to some of which decisions we were referred on the argument.

In *Garrett v. The Provincial Ins. Co.*, 20 U. C. R. 200, the policy contained a provision that, "the assured hereby agrees to keep twelve pails full of water on each flat of said mill during the continuance of this policy." And it was held that the assured could not recover on the policy for a loss, though that loss had *not* been occasioned by the

not keeping the twelve pails full of water on each flat of the mill.

The Chief Justice said it "is a condition on which the insurance was effected, and is termed a promissory warranty. The performance of it is necessary, we think, to the right to sue upon the policy. \* \* \* The effect of what is shewn is, that the defendants agreed for a certain premium to insure the mill, provided the insured should always keep in the mill, at hand, certain means of extinguishing any fire that might break out. If the insured had declined to come under that condition, the defendants might either have exacted a higher premium or declined the risk."

In this case the condition goes to the whole consideration: *Ritchie v. Atkinson*, 10 East 295. And "whether covenants are to be held dependent or independent of each other is to be determined by the intention and meaning of the parties as it appears on the instrument, and by the application of common sense to each particular case": *Stavers v. Curling*, 3 Bing. N. C. 368; see also *Behn v. Burness*, 3 B. & S. 757.

In many cases the condition relied on to defeat the claim on the policy provides that on non-compliance with it no recovery shall be had, or the policy shall be void, and so it is clear that the mere non-observance of it is by the very terms of the engagement a defence to the action. This condition contains no such positive term, but in our opinion that does not alter the case, for the question is whether the contract was not altogether based upon the terms of this condition being literally and honestly observed, and the facts therein referred to, if they existed, being fully communicated to the company, to enable them to determine whether they would or would not assume the risk, and if they did so, then, with such full knowledge of all the facts, at what rate they would undertake it.

It is quite plain that this was most material information which they bargained for, and which they required to have to qualify them to deal on even terms with the plaintiff,

and that the want of it may have operated very injuriously to the defendants.

The object of requiring the disclosure to be made as to whether there are other insurances on the same property is, that the company on application to them to insure may know what interest the applicant has in the continuance and preservation of his property, and what loss or benefit he would derive by its destruction, and also what are the nature and extent of their own risk.

The additional sum of \$1,000 insured upon the property and not communicated to the defendants might or might not have deterred them from accepting this risk, and might or might not have added to the premium, and it may or may not have been of that amount, in proportion to the value of the subject which was insured, which would materially, if at all, have lessened the plaintiff's concern in the preservation of it from loss by fire. The plaintiff cannot contest these matters with the defendants, for they bargained that he should tell them of this increased insurance, and that they would insure him as he requested them to do if he told them truly what he was asked to state, and he has failed in his engagement; he has deceived them in a matter which forms the basis of the contract.

The case of *Marshall v. The Emperor Life Assurance Co.*, L. R. 1 Q. B. 35, is like this, for there the condition did not declare that the policy on non-observance of this condition should be void, and it was pleaded in bar of the claim. The action was on a life policy. The only question was whether the defendants should give particulars under their plea. But the plea seems to be used without any doubt of its being a valid plea, and I have no doubt that it was.

If this be not a condition precedent or warranty on the part of the plaintiff, then he must, notwithstanding his breach of it, be entitled to recover the full measure of his insurance, and the company must look for indemnity by a cross action against him. That was never contemplated. And what damages would the defendants be entitled to receive?

If they averred they would not have taken the risk at all under these facts, and they might well say so, they could recover the full insurance money back again. Their damages would be equal to the sum they had paid; their demand would go to the whole consideration of the contract. But a condition which goes to the whole consideration is a condition precedent or warranty, by the non-performance of which the party in default cannot recover. And as that is the position of things in this action, we are of opinion the plaintiff must fail.

As to the second issue, by the terms of the rule a nonsuit should be entered, but I doubt if that can be done when there are issues on the same record still standing in favor of the plaintiff, though it is said it may be done if the other issues are all found for the defendant.

It would be better that the verdict upon it should be entered, as it ought to have been at the trial, for the defendants.

As to the fourth plea. It appears warehouse receipts were given to the Merchants' Bank, the Bank of Commerce, and the Bank of Montreal.

It was contended that as to the receipts given by Higginbotham, they were of no validity, because he was not a warehouseman. If that be so, the Bank of Commerce, who are assignees of this policy, cannot dispute Higginbotham's capacity to give such receipts if they claim to be assignees and beneficial plaintiffs by reason of such a receipt to themselves.

The Merchants' Bank unquestionably claim by a receipt from Higginbotham. It will be of no value to that Bank, nor of any importance in this suit, if Higginbotham were, in fact, not a warehouseman, and 'if the plaintiff and the other Banks are not concluded from disputing that he was a warehouseman.

I think the evidence shews he was in fact not a warehouse man, so far as we are at liberty to draw inferences, though the question should properly have been submitted to the jury.

Are the plaintiff and the other Banks precluded from denying that Higginbotham was a warehouseman? The plaintiff must be estopped from denying the fact, having procured Higginbotham to give the receipts. The other Banks, particularly the Bank of Commerce, the beneficial plaintiffs in this suit, must be estopped also from denying the fact, if they claim under a like title themselves. If they do not claim under Higginbotham they can dispute the validity of the receipt to the Merchants' Bank, for the receipt to the latter was given in December, while the receipt to the Bank of Commerce was given in October or November. The prior title then of the Bank of Commerce under a receipt not from Higginbotham, must permit them to support their own rights by impeaching those of the Merchants' Bank derived from a different and adverse source.

This, however, can only be done by setting up a title obtained by receipts given by the plaintiff himself, and that is all that the defendants want to establish. But it is of little consequence to the Bank of Commerce to defeat the interest of the Merchants' Bank by an exception which inexorably subverts their own.

If the enquiry is only as to the effect which the Merchants' Bank receipt has on the case, the argument will be at an end, for the mere fact that Higginbotham was not a warehouseman puts that receipt aside at once, and the effect of the other receipts in the case will not be open for discussion. The notes of the learned Judge seem to read as if that were the only receipt that was relied on to sustain the issue on the fourth plea.

The rule, however, and I think the argument upon it, applied to the receipts that were given to the other Banks.

If this be so, then these receipts, as before stated, were either given by the plaintiff himself, in which case the facts are plainly before us for adjudication, as the defendants represent them and desire them to be; or the receipts were given by Higginbotham for the plaintiff, in which case all three banks rest upon the same title, and the title of the one is as good as the title of the other.

Then as the Bank of Commerce are the beneficial plaintiffs under Higginbotham's receipt (taking the latter alternative) they are concluded from disputing Higginbotham's competency to grant the receipt to them, and if so, to the other banks also.

It is not necessary that all three receipts should be made out to be valid against the plaintiff or against the banks. If any one of the receipts is established as operative, that will enable the fourth issue to be effectually determined.

In my opinion, if the Merchants' Bank receipt be alone in question, the verdict on the fourth plea must remain as it is. If the receipts to all three banks are to be considered, then the question fairly arises, whether the receipts or any of them given by the plaintiff himself, or by Higginbotham for the plaintiff, and by estoppel rightly representing the plaintiff and the banks or some one of them, conferred such a title on the banks, or on any of them, as to constitute them or any of them owners of the property insured or of any part of it? If such a title were conferred the finding must be for the defendants; if otherwise the verdict will remain as it is.

The Dominion Act, 31 Vic. ch. 11, sec. 7, declares that the endorsement of the receipt by the owner of, or person entitled to the property, shall transfer as collateral security for the due payment of the bill or note discounted "all the right and title of the endorser to or in such cereal grains," &c., "subject to the right of the endorser to have the same re-transferred to him, if the bill or note be paid when due. And in the event of non-payment of the bill or note when due, such bank or private person may sell the said cereal grains," &c., "and retain the proceeds, or so much thereof as will be equal to the amount due to the bank or private person on such bill, note or debt, with interest or costs, returning the surplus, if any, to such endorser."

Sec. 8 enacts that "no such cereal grains," &c., "shall be held in pledge by such bank or private person for any period exceeding six months \* \* \* and no sale of

any cereal grains," &c., "shall take place under this Act until or unless ten days' notice of the time and place of such sale has been given \* \* \* to the owner of such cereal gains," &c., "prior to the sale thereof."

The effect of the endorsement being to transfer to the endorsee *all the right and title of the endorser* in the property, with the power of sale in case of default, leaving to the endorser the right to have the same re-transferred to him if the bill, note or debt be paid when due, constitutes it in effect a mortgage. The term *pledge* in the 8th section is plainly inappropriate, for it is very different from a mortgage: *Halliday v. Holgate*, L. R. 3 Ex. 299; *Donald v. Suckling*, L. R. 1 Q. B. 585. The seventh section speaks of the surplus after sale by the endorsee being repaid to the *endorser*. The eighth section speaks of notice of the intended sale being given to the *owner*.

I think these expressions do not enable us to settle the meaning and effect of the endorsement. That must be determined by the more explicit enactment of the statute. And in my opinion a transfer which passes all the right and title of the endorser to the endorsee, and grants to him in express terms the power to sell, does in legal contemplation constitute him the owner of the property, at all events for insurance purposes.

When, therefore, the plaintiff procured the insurance in question he did not insure it in the names of all the owners. The owners were then the banks, or some one of them, by virtue of the receipts which had been before then endorsed to them, and which they still held upon the property insured.

As the application does not appear to have been put in, I cannot say whether the other part of the plea was proved or not, which alleges "nor was the interest of said owner stated in the application for insurance."

But as enough of this plea has been proved to warrant a finding on it in the defendants' favor, the decision must be for them, if, as before stated, the receipts to all the banks are in evidence or to be considered as in evidence, and if we

are at liberty by the course taken at the trial, or upon the argument before us, to refer to them, as I think we are.

The learned Chief Justice and my brother Morrison are not prepared to pronounce a definite opinion as to the defendants' right to recover on the fourth issue. And as they concur in the opinion expressed as to the second issue.

The rule will be absolute to enter a nonsuit for defendants on the second issue, and discharged as to the residue.

*Rule accordingly.*

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MACKLEM ET AL V. THORNE ET AL.

*Sale of hides—Inspector's weights to govern—Inspector's Fees—Commission.*

Upon a sale of hides by weight, of specified qualities according to inspection, *i. e.* "cured and inspected No. 1 hides," &c. *Held*, that the weight as ascertained and marked by the inspector, under 27-28 Vic. ch. 21 and 29-30 Vic. ch. 24, were binding upon the parties, in the absence of any thing in the agreement to the contrary.

*Held*, also, that the seller must pay the Inspector's fees, the agreement not providing otherwise.

*Held*, also, that upon the evidence, set out in the case, the defendants were acting as principals, not as agents for the plaintiffs, the purchasers, and therefore could not charge commission.

DECLARATION.—First Count—That in consideration that the plaintiffs would accept certain drafts for money drawn by defendants on the plaintiffs, for the alleged price of certain hides before then sold to them by defendants by weight, the defendants promised the plaintiffs to make any mistake in the weight of the hides right, and the plaintiffs relying on the promise of the defendants accepted and paid the said drafts; and although the hides were by mistake short in weight, and although the drafts were as to amount in excess of the price of the hides, according to the true and actual weight thereof, of which defendants had notice, yet defendants, though requested so to do, have refused to make the mistake right.

## 2. Common count.

Pleas to first count: 1. Defendants did not promise.

## 2. That the hides were not short in weight.

To the second count: 3. Never indebted. 4. Payment—  
Issues.

The case was tried before Richards, C. J., at the last  
Fall Assizes at Toronto. The plaintiffs claimed an allow-  
ance on the first lot of hides sent of..... 875 lbs.

and on the second lot..... 981

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Total.....	1856 lbs.
At the rate of $7\frac{1}{2}$ c. per lb.....	\$139 20
Commission on first lot.....	7 17
Inspector's Fees.....	15 00

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In all..... \$161 37

for which sum they obtained a verdict, subject to be moved  
against as hereinafter mentioned.

The evidence was long, and the exhibits were both long  
and numerous. It is not necessary to set them out, for  
the only questions were:

1. Whether the Inspector's weights stamped on the dif-  
ferent hides were, in the absence of anything being said  
on the subject between seller and buyer, to be taken as  
the weights which governed their contract or not.
2. Whether the seller or the buyer pays the Inspector's  
fees, nothing having been said on the subject at the time  
of the bargain.
3. Whether the plaintiffs were liable for the charge for com-  
mission.

*Thorne* obtained a rule calling on the plaintiffs to shew  
cause why the verdict rendered should not be set aside and  
a verdict entered for the defendants, or why the verdict  
should not be reduced to such amount as the Court might  
direct upon a perusal of the evidence, from which the Court  
were to be at liberty to draw such inferences of fact as a

jury might have done ; and upon the law of the case, on the leave reserved at the trial.

*Harrison*, Q. C., shewed cause. The Inspector's marked weights on the hides did not bind the plaintiffs to take the hides at such weights from the defendants. *Inspection* is different from weighing or measuring. Inspection applies to the quality, not the weight of the hide ; there are different grades of quality, which the inspector is to determine with respect to each hide, and to mark it accordingly. When the defendants, by their telegram of the 12th of January, 1870, offered to "purchase No. 1 inspected hides" for plaintiffs, and the plaintiffs in their answer of the 13th speak also of "Green No. 1 inspected hides," and "cured hides inspected No. 1 ;" and defendants in the letter of the 14th say, "we can purchase for you No. 1 inspected hides at," &c. ; and plaintiffs in their answer of the 17th say they will take 150 per week for four or five weeks "at 7½c., No. 1, cured and inspected" hides ; and defendants in their letter of the 18th say they have contracted for the supply to the plaintiffs of 150 hides per week for the next five weeks, the price to be 7½c. "for No. 1 cured and inspected hides ;" and the plaintiffs in their letter of the 20th, in referring to the bargain, speak twice of it as for "cured and inspected No. 1 hides"—all that the plaintiffs understood by the expression was that the *quality* was to be guaranteed to them by the inspection. It was a matter of fact whether the plaintiffs bought or did not buy according to the inspector's weight or according to the actual weight, and the evidence, especially when there is so great a difference between the marked and the actual weight, shews the reasonableness of the plaintiffs' view of the contract. The Statutes 27-28 Vic. ch. 21, and 29-30 Vic., ch. 24 are those which are applicable to the case. A usage that the inspector's weight should govern is not maintainable : *Tay. Ev.*, secs. 1077 to 1080. If such a usage in Toronto were good, it was not shewn the plaintiffs had knowledge of it ; they do not reside in Toronto, nor do they commonly deal there :

*Clayton v. Gregson*, 5 A. & E. 302 ; *Kirchner v. Venus*, 12 Moo. P. C. C. 361, 5 Jur. N. S. 395 ; *Bain v. Gooderham*, 15 U. C. R. 33 ; *Franklyn v. Lamond*, 4 C. B. 637. The charge for commission was not properly made as defendants were vendors : *Magee v. Atkinson*, 2 M. & W. 440 ; *Higgins v. Senior*, 8 M. & W. 834 ; *Jones v. Littledale*, 6 A. & E. 486. The contract should be construed according to the language of the parties in the correspondence referred to : *The Beacon Fire and Life Ins. Co. v. Gibb*, 1 Moo. P. C. N. S. 73, 9 Jur. N. S. 185 ; *Smith v. Jeffries*, 15 M. & W. 561 ; *Ireson v. Mason*, 12 C. P. 475.

*McMichael* and *Thorne* supported the rule. Usage strictly is not relied on here, but it may be considered as among the surrounding circumstances connected with the contract. The inspector's weight, which he marks on the hides, is not the actual weight, but more or less than the actual weight according to the condition of the hide, as to whether it is clean or unclean, or drier than it was in its green state. The green hide is the standard weight of the hide, no matter how dry it may afterwards be. The Inspector is compelled by law to mark the weight on each hide. For what purpose is it done, if it is not to be taken as the proper weight to be given to it, although different from the true weight at the time of a subsequent sale ? No one else can, under a penalty, mark the weight on the hide but the Inspector, unless he adds also, in plain words, "not inspected." The evidence shewed that the tanners for whom dealers in hides buy always pay the Inspector's fees. The commission was properly charged, as defendants had to buy the hides for plaintiffs ; the defendants in that respect acted as agents for, and not as principals in the dealing with the plaintiffs. The sum charged was at last paid, with a full knowledge of all the facts, and not under protest : *Lucas v. Bristow*, E. B. & E. 907.

WILSON, J., delivered the judgment of the Court.

The Inspector of hides and leather, under the Acts of 1864, ch. 21 ; 1866, ch. 24 ; and 1870, Dominion Act, ch. 37, is a public officer, and is bound to inspect all hides and leather when required to do so : (Act of 1864, sec. 27.)

His duty is, by examination and inspection, to "ascertain the respective weights, qualities, and conditions" of the hides and leather." Sec. 12.

"To make deductions from the weights of hides on account of dirt or damage from cuts, and also additions thereto on account of loss by drying, as in his discretion he may see fit." Sec. 14 ; Act of 1866, sec. 3.

"To brand, stamp, or mark immediately after inspection, on both sides of each hide the initials of the name of the place of inspection, and the initials of the name of the Inspector." Act of 1864, sec. 21 ; Act of 1866, sec. 2.

"To brand or stamp the same so as to be *indelible*, and which brand or stamp shall also shew the weight of the raw hide or leather, as also the figure denoting the quality." Act of 1864, sec. 25 ; 1866, sec. 2. The form may be thus :

1	112 lbs.
T.	J.B.,I.

2	90 lbs.
T.	J.B.,I.

3	60 lbs.
T.	J.B.,I.

The figure 1 representing first quality, 112 lbs. the weight T, Toronto, J. B., I., the initials of Inspector's name and office ; the figure 2 denoting second quality ; the figure 3 designating a damaged or rejected article : Act of 1864, sec. 25 ; 1866, sec. 3.

To keep books open to public inspection in which he shall enter a statement of all green, raw, and salted hides and leather inspected by him, shewing the respective weight, quality, and condition thereof, how the same had been classified, for whom inspected, and the amount paid for inspection : Act of 1870, sec. 1.

To make returns of the above matters to the Board of Trade of the city or town in respect to which he has been appointed twice a year : Act of 1870, sec. 2.

These provisions shew that the green raw hide is made the standard weight of the hide : Act of 1864, sec. 14 ; 1866, sec. 3 : that the inspection is for the purpose of ascertaining the weight, quality, and condition of each hide ; and that an indelible mark must be put on each hide, immediately after inspection, specifying the quality, weight, place of inspection, name of inspector, and his name of office.

In performing these duties the Inspector is entrusted with large powers of adding to, or subtracting from the actual weight of each hide, " the whole at his discretion" : (Act of 1866, sec. 3) or as " in his discretion he may see fit : " (1864, sec. 14).

An appeal lies against his decision " with regard to the quality or condition " of raw hides or leather : (Act of 1864, sec. 33), but not with regard to weight.

I cannot conceive any use in making a standard weight of the hide as if in its green state, and marking the weight with other particulars by an indelible mark on each side of it, and prohibiting the sale of it until inspected, (Act of 1866, sec. 1,) if it is not for the purpose of binding those who deal in the buying or selling of them, and facilitating their transfer from one to the other, and of saving the trouble of repeated weighing at every change of ownership, and the controversy that might arise as to the price to be paid according to the green, or partially green, or cured or dried condition in which they might happen to be at the time of each sale.

A degree of currency is given to the article by the inspector's imprimatur ; a degree of steadiness is given to its value by fixing the standard of weight as at the time the article was in its green state, from and by which its value at any time afterward, and notwithstanding any change in it, can be readily settled ; and a degree of convenience is afforded to the dealers in that particular business, and to the benefit of trade generally, which nothing but the adoption of a standard of some kind as to weight or otherwise could have given.

In the absence of anything in the contracts of parties

shewing that a different standard was to have been acted on than the one provided by the Legislature, and which it is so much for the benefit of every one to accept, it must be presumed they contracted with reference to the Legislative standard. In this particular case both parties make reference expressly in their communications to *inspected* hides, meaning an authorized inspection, and including plainly within the purpose and object of it that which ascertained "the respective weights, qualities, and condition" of each hide.

I have no doubt that upon the evidence (there being no fraud or colour of it in fact or imputed), the plaintiffs must be held to have bought at and according to the inspector's weight stamped upon the hides, and not at the actual weight of the hides at the time of their purchase.

There are other provisions in the statutes which shew the effect that was intended to have been given to the Inspector's acts. He is made liable in damages if there be a deficiency or excess in the weight of harness leather, if the excess be more than ten per cent. or if the deficiency be more than five per cent. of the whole weight: (Act of 1864, sec. 16; of 1866, sec. 5.)

Now what damage can there be if the parties buying and selling are to be at liberty, the one against the will of the other, to buy or sell at his own weight, without regard to the brand of the Inspector? So again, in cases of appeal, the Inspector is liable for the charges of it if the decision be against him: (Act of 1864, sec. 33.)

As to the main ground of dispute, the weight of the hides, we are of opinion the plaintiffs fail to sustain their claim.

As to the Inspector's fees, we think, without an express bargain that the purchaser is to pay them, he cannot be charged with them.

These hides were inspected long before the defendants bought them; the Statute requires that if they are produced within the Inspector's limits they must be inspected before they are offered for sale or sold, and if not produced

within the Inspector's limits, the *purchaser* of them must have them inspected before he sells or disposes of them in any way whatsoever : (Act of 1866, sec. 1.)

The facts shew that the defendants were not the first purchasers of the hides, so that the hides should have been, and, as the evidence shews, were in fact inspected before the defendants got them. The evidence does not shew that the defendants paid the Inspector's fees, but if it did it would make no difference.

As to this item, the defendants, in the absence of an agreement to be paid it, cannot charge it.

As to the item for commission, the right to it depends on whether the defendants were acting as principals or as agents for the plaintiffs.

In our opinion they were acting as principals, for they could not be agents unless the plaintiffs made the defendants their agents, which they did not understand they were doing, or unless the plaintiffs employed the defendants as commission agents or brokers, which they did not do, or unless the defendants were in fact commission agents or brokers.

There is a good deal of evidence from which it might be inferred the defendants were buying as agents for the plaintiffs ; for instance, in their telegram of the 12th of January, they say " we can purchase, &c., shall we secure a thousand for you." Plaintiffs answer that by saying " Can you *buy* them so that they will not cost more than  $7\frac{1}{2}c.$ " Defendants say on the 14th " We can purchase for you to-day, we would advise you to let us secure 1000 for you." Defendants again on the 18th, say, " We have contracted for the supply to you," &c.

But notwithstanding all this the plaintiffs in their letter of the 17th, upon which the hides were supplied, said, " However, if you like to send us 150 hides per week for four or five weeks, we will take them at the  $7\frac{1}{2}c.$ "; so that they bargained for the hides at that price with the defendants if they liked to send them, which shews a mere bargain and sale, and not a commission or agency transaction.

Upon the whole, we think the position by defendants of being brokers or agents generally, or for the plaintiffs in this transaction, is not made out, and the right to commission fails.

The plaintiffs will therefore retain their verdict for the two sums of \$7.17 and \$15—\$22.17, for the commission and Inspector's fees wrongly charged, the verdict being reduced by the sum of \$139.20, the price of the differences of weight. The defendants succeed as to that sum.

Rule absolute to reduce plaintiffs' verdict to \$22.17.

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### SHERBONEAU V. THE BEAVER MUTUAL FIRE INSURANCE ASSOCIATION.

#### *Insurance—Statement of title—Possession.*

The plaintiff had lived with his father for about 37 years, on land belonging to the Crown. A barn had been built on it, resting upon abutments of loose stones, which the plaintiff, in October, 1867, insured with defendants. In December, 1867, a patent issued to one F., and in June, 1869, T., claiming through the patentee, recovered judgment in ejectment against the plaintiff and his father, and placed a *hab. fac.* in the Sheriff's hands. A few days after, and before it had been executed, the barn was burned. Proceedings in Chancery was then pending by the plaintiff contesting the claim of T. The policy required that the plaintiff in his account of the loss should shew the true nature of his title at the time of the fire; and the plaintiff in such account stated that he was *bonâ fide* owner, and that his title was by possession for thirty years by himself and his father.

*Held*, that the account did not give a true statement of the plaintiff's title; that the barn was part of the freehold; and that he could not recover.

*Wilson J.*, dissenting, on the grounds that the plaintiff being in possession, and prosecuting his claim in Equity, had an insurable interest: that as against an adverse claimant he might treat the barn as a chattel, which he could remove; and in this view his statement of title was correct.

ACTION on a fire policy, dated 3rd October, 1867, made by defendants, under seal, with the plaintiff, to continue to the 30th August, 1870, for the sum of \$200, on a barn owned by the plaintiff, situate on lot 15, in the 6th concession of the township of Hungerford; averring a loss by fire.

Defendants pleaded, 1. A denial of the deed.

2. That one of the conditions endorsed on the policy required, that in case of loss by fire the assured should deliver as particular an account of his loss as the nature of the case would admit, signed with his own hand and accompanied with his own oath, declaring the said account to be true and just, and shewing also (among other things) what was the true nature of his title at the time of the fire; and that the plaintiff did not accompany his statement of loss with his oath shewing what was the true nature of his title to the property destroyed at the time of the fire; but therein made default, in this, that he stated in the said oath that he was *bonâ fide* owner of the property, and that his title was by possession for and during the last thirty years by himself and his father, Francis Sherboneau, senior, whereas at the time of the fire the plaintiff had no title to the said property, either by possession or otherwise.

3. That the plaintiff was not at the time of the loss by fire interested in the barn as alleged. Issue.

The cause was tried at the last spring assizes, before Gwynne, J., at Belleville, without a jury, when a verdict was entered for the defendants, with leave to the plaintiff to move to enter it for himself for \$206, if the Court should be of opinion that the plaintiff was entitled to recover, either on the ground of the barn being a chattel not annexed to the freehold, or of its being a building annexed to the freehold.

The evidence for the plaintiff shewed that his father had lived on the land for about thirty-seven years: that the plaintiff always lived on the land, and was the eldest son: that about fifteen or sixteen years ago his father gave the plaintiff a quit-claim deed of the land, the plaintiff undertaking to support his father for life, and that the father about six years ago took the deed out of the plaintiff's chest and destroyed it: that the father had no other title than by possession; that the barn was built on loose stones, abutments, with mortar, there being no wall; it could have been lifted off the stones: that a judgment was entered

against the plaintiff on the 12th June, 1869, and the barn was destroyed two or three days afterwards; the plaintiff left the place last winter, he was afraid he would be turned off.

The title to the land was proved as follows, by the defendants :

Patent to James J. Farley, dated 27th December, 1867.

Deed, James J. Farley to Gabriel Sherboneau, dated 7th January, 1869.

Deed, Gabriel Sherboneau to James Jeffs, dated 7th January, 1869.

Exemplification of judgment in the Common Pleas, entered 12th June, 1869, showing a recovery of the land in ejectment by James Jeffs against Francis Sherboneau, senr., (the father) and the plaintiff.

A writ of possession placed in the Sheriff's hands on the 12th June, 1869, but not executed at the time of the fire.

Chancery proceedings were also proved to be pending at the suit of the plaintiff against Jeffs and Gabriel Sherboneau, to recover the land if it could be proved he bought the land with notice of the plaintiff's claim, or to recover the price from Gabriel Sherboneau which he received for the land.

Jeffs also insured the same barn with the defendants in February, 1869, for \$200, and had been paid that sum by them.

In addition to the condition of the policy set out in the plea was another, the 6th, which was relied upon, that "property not really owned by the insured will not be covered by his policy."

In Easter Term last, *Harrison*, Q. C., obtained a rule nisi to enter a verdict for the plaintiff, pursuant to the leave reserved, for \$206, on the ground that the plaintiff was entitled to recover in respect of the barn, whether the barn was to be considered as a chattel or as part of the realty.

*Robinson*, Q. C., shewed cause. If the barn were built and used as it was by one assuming to own the land, and for

the better enjoyment of the land, it must be considered as part of the freehold : *Bunnell v. Tupper*, 10 U. C. R. 414; *Bald v. Hagar*, 9 C. P. 382; *Cleaver v. Culloden*, 14 U. C. R. 491; *Paterson v. Pyper*, 20 C. P. 278. The plaintiff had never more than a possessory interest, which was of no avail against one claiming title under the Crown : *Sherboneau v. Jeffs*, 15 Grant 574. *Stevenson v. The London and Lancashire Insurance Co.*, 26 U. C. R. 148, was cited at the trial for the purpose of shewing that the defendants could not set up the want of plaintiff's interest at the time of the fire, as that interest was just the same then as it was at the time of insurance, but *Shaw v. The Phoenix Insurance Co.*, 20 C. P. 170, 179, shews how that case is to be considered, and is in point to shew that the plaintiff had no interest at the time of the fire in the barn.

*Harrison*, Q. C., and *Flint*, supported the rule. The barn may be a chattel or a part of the realty; it will depend on circumstances which it was : *Great Western Railway Co. v. Bain*, 15 C. P. 207; *Stevens v. Gourley*, 7 C. B. N. S. 99, 108; *Burnside v. Marcus*, 17 C. P. 430; *The Queen v. The Inhabitants of the Parish of Lees*, L. R. 1 Q. B. 241; *Climie v. Wood*, L. R. 3 Ex. 257, S. C. in Ex. Ch., L. R. 4 Ex. 328, 443; *Cullwick v. Swindell*, L. R. 3 Ex. 249. As to the plaintiff's title, see *Mason v. The Agricultural Mutual Assurance Association*, 18 C. P. 19. The alleged false statement is in the proof of loss, and it is not averred that such statement was false and fraudulent. If the plaintiff had an insurable interest he is entitled to recover : *Milligan v. The Equitable Insurance Co.*, 16 U. C. R. 314; *Smith v. The Royal Insurance Co.*, 27 U. C. R. 54; *Richards v. The Liverpool Insurance Co.*, 25 U. C. R. 400.

WILSON, J., delivered the judgment of the Court.

By the Mutual Insurance Act, Consol. Stat. U. C. ch. 52, sec. 20, as amended by 27-28 Vic. ch. 38, sec. 2., the Company may insure any property movable or immovable, whether the owner of the property be or be not a freeholder.

By Sec. 27, as amended by 27-28 Vic. ch. 38, sec. 3., "If the assured has a title in fee simple unincumbered to the building or buildings insured, and to the land covered by the same," the policy thereon \* \* "shall be deemed valid and binding on the Company, but not otherwise; but if the assured has a less estate therein \* \* the policy shall be voidable at the option of the directors, unless the true title of the assured be expressed therein, and in the application therefor."

The application has not been put in, and whether it expresses the true title of the assured or not I cannot say. The policy does not; but if the application did, that would be the same as if the policy had expressed it: the application being part of the policy.

The policy is no longer void, as it originally was, if the assured had a less interest than a fee, and the lesser estate were not expressed in the policy and application; it is voidable only, and the directors have not elected to avoid it. It must therefore be regarded as the policy of an ordinary Insurance Company in this respect.

From the facts stated the insured had undoubtedly an insurable interest at the time of the making of the policy on the 3rd of October, 1867. He and his father had held possession for about thirty-seven years, the title being still in the Crown, and under some expectation of getting the grant of it from the Crown, as the father's name was entered upon the Crown Land Agent's map of the Township against the lot, and he had acquired title at an early period by purchase from, or in trade with some one who had or who professed to have had a prior claim, and we know that the Crown very much regards the interests even of squatters on its lands when others are proposing or bidding for the lands against them.

The case of *Stevenson v. The London and Lancashire Fire Insurance Co.*, 26 U. C. R. 148, bears strongly on this point.

The plaintiff had, however, by some means, and apparently with much hardship and great injustice to him, lost

the land, for the Crown on the 27th December, 1867, granted it to James J. Farley.

He still, however, retained possession until the time of the fire, although before it a recovery had been obtained against him in ejectment by the legal owner under the Crown grant, and a writ of possession was in the Sheriff's hands to remove him from the possession.

He contested the legal owner's claim by proceedings in Chancery, alleging that the legal owner, Jeffs, was either a purchaser with notice of the plaintiff's equitable claim, or was not a *bonâ fide* purchaser. The Chancery proceeding was not determined against him at the time of the fire, nor at the commencement of this suit, nor until some time afterwards, even if it has been determined yet.

I think the plaintiff had clearly an insurable interest at the time of the making of the policy, and that he had still an insurable interest while he had the actual possession of the barn, and was with *bona fides* prosecuting his claim in equity for the restoration of the land itself.

As against the third plea, I think the plaintiff entitled to succeed.

As to the second plea, the plaintiff said that his title at the time of the fire, was as "*bonâ fide* owner of the property (the barn) holding the same by possession for or during the last thirty-five years by myself and my father."

It does not appear to me that such a statement was, in the language of the condition, and under the knowledge that a recovery in ejectment had been actually had against him at the Assizes some weeks before the fire, by one having a better and perfect legal title, what could properly be called a description of the true nature of his title at the time of the fire, if the barn is to be considered as part of the freehold.

But I think it may be held to have been truly described if it can as against an adverse and hostile claimant be treated by the plaintiff as a chattel, and not as annexed to the freehold. And as against such a person, though there is much nicety and difficulty in deciding it in other cases and in

a different relationship, I think the plaintiff, so long as he was left in the actual possession of the land, could have removed the barn in question entirely away, without making himself liable to his opponent for any injury done to the freehold.

I see nothing in the policy or in the evidence which shews the plaintiff ever treated the barn as either movable or immovable property, chattel or realty; and as his interest has been varied by the acts of others, though remaining the same as at first so far as his own acts are concerned, I do not see why he may not adapt his right to the altered state of things; just as timber trees which are part of the freehold may be treated by the owner as goods and chattels by selling the timber to be immediately cut, at so much a foot, for that is equivalent to a sale of the trees when severed—*Smith v. Surman*, 9 B. & C. 561—especially when it may be done without injury to the substantial rights of the defendants. In *Culling v. Tufnal*, B. N. P. 34, a barn resting on blocks, but not fixed in or to the ground, was held to be removable by the tenant who put it there. Lord Ellenborough, C. J., in *Elwes v. Maw*, 3 East 38, said that the barn just referred to was not a fixture, it was not fixed in or to the ground. In *Wiltshear v. Cottrell*, 1 E. & B. 674, a granary resting on staddles which were built into the ground, but which was not attached to the staddles except by its weight, was held not to be a fixture. And see generally 2 Smith L. C., 6th ed., 153 to 189.

I set aside altogether the suspicious fact that the fire took place two days after the Sheriff had got the writ to enforce the plaintiff's removal from the property, for it is not in issue in this cause, though it may possibly explain why it is the defendants resist payment of the claim, which is otherwise meritorious.

On the facts fairly before the court, I am of opinion the plaintiff is entitled to succeed, and that the rule should be absolute, setting aside the verdict for the defendants, and directing a verdict to be entered for the plaintiff with \$206 damages.

It becomes quite unnecessary to analyse and apply the many cases which were referred to on the subject of fixtures, and the law upon them referable to different classes of persons, and what are chattels merely, or if fixtures when, and in what manner, and to what extent removable, because the third party who acquired the legal title got it adversely to the owner and builder of the barn, and not from, by, or through him in any way whatever.

RICHARDS, C. J.—I am not able to agree with my brother Wilson in the conclusion he has arrived at. In my opinion the barn, which was plainly a part of the freehold by the intention of the occupant of the land when he built it, and by the intention of the plaintiff after he acquired the occupancy, continued to be and to be considered by him up to the time of his insuring it, and till it was destroyed by fire, still a part of the freehold.

The barn cannot now, for the purposes of their insurance be treated as a chattel: *Gasco v. Marshall*, 7 U. C. R. 194.

MORRISON, J., agreed with the Chief Justice.

*Rule discharged.*

# REGINA V. MCNABB.

*Writ of extent—Practice—31 Vic. ch. 10, D.*

A writ of extent was set aside by Judge's order, and it was ordered that another writ might issue upon the fiat for and tested as of the date of the former writ. *Held*, that such order was unobjectionable.

*Held* also, that the affidavit, set out below, upon which the writ issued, was sufficient, and that the defendant was sufficiently shewn by it to be a debtor to the Crown.

*Held* also, that the Post Office Act 1867, 31. Vic. ch. 10, sec. 89, D., does not take away from the Crown the remedy by extent upon a bond given by a postmaster.

IN Easter Term, 1869, *Lauder* obtained a rule *nisi* calling upon Her Majesty's Attorney-General for the Dominion of Canada to shew cause why the writ of extent issued in

this cause, and all proceedings had thereunder, should not be set aside, or why the return or finding of the jury under the enquiry held by the sheriff of the County of Grey under the said writ should not be set aside, and a new or fresh enquiry held, upon the following grounds:

1. That the said writ of extent was issued irregularly and upon insufficient evidence, and the said writ issued upon a fiat upon which a former writ issued, without any special affidavit having been filed.

2. That the writ should not have issued without a *sci. fa.* having been issued, as it was not shewn that the defendant is the debtor of the Crown.

3. That the remedy for the collection of a debt due upon a bond given by a postmaster is not by extent, but under the provisions of the Statute of Canada, 31 Vic, ch. 10.

4. That the proceedings under the writ and upon the enquiry by the sheriff were not conducted according to law, in this, that evidence was refused by the sheriff and jury which ought to have been received: that no evidence was allowed on the part of the claimants, and that the finding is based upon insufficient evidence, &c.; and that proceedings be stayed on the writ of extent, and time given to the claimants to appear and claim.

It appeared from the affidavits and papers filed, that on the 9th September, 1868, Mr. Dewe, Post Office Inspector, made oath that the defendant up to the 17th August previous had been postmaster in the village of Durham, in the County of Grey: that about that day he absconded from this Province: that at the time he so absconded the deponent verily believed he was in default to the Crown for moneys collected by him in his capacity as postmaster, in the sum of \$2,025.30, or thereabouts: that the defendant had given a bond to the Crown in the penal sum of \$2,000, with sureties, for the due performance of his duties as such postmaster: that he was informed, &c., that defendant was possessed of property in the County of Grey: that it was desirable that a writ of extent should issue on such

bond to attach such property, and he believed that unless such property were attached there was danger of it being disposed of so as to defeat the claims of the Crown.

It appeared that on that affidavit a fiat was had, and a writ of extent issued on the same day ; and that afterwards, on the 19th March, 1869, the learned Chief Justice of this Court made the following order :

THE QUEEN	}	“ Upon the application of Her Majesty the Queen, by the Attorney-General for the Dominion of Canada, and upon hearing the said Attorney-General by his agent, and upon reading the writ of extent heretofore issued herein and inquisition taken thereunder, I do order that the writ of extent issued on the 9th of September last, directed to the sheriff of the County of Grey, and the inquisition taken and had thereunder, be set aside, quashed and vacated, and taken off the files of the Court, and all proceedings had and taken under said inquisition be set aside, waived and vacated, and that her said Majesty be at liberty to issue another writ of extent under the fiat for the former writ, and tested as of the former writ : viz, 9th day of September, &c., directed to the sheriff of the County of Grey.”
vs.		
MCNABB.		

That on the 20th March, in pursuance of such order, a writ of extent issued to such sheriff, such writ reciting the defendant's bond, and that it was registered in the office of the Clerk of this Court on the 29th May, 1863, which writ the sheriff returned with the inquisition attached, and shewing that the defendant was seized in certain lands.

The complainant Hunter filed an affidavit, stating that he had a conveyance of 20 acres of the east part of the first division of lot 28 in the first concession west in Bentinck, and No. 14, fronting on Garrafraxa Street, and No. 14, fronting on the west side of Albert Street, in the Village of Durham, subject to redemption by the defendant upon certain conditions mentioned in a written agreement between the defendant and himself : that he also was assignee of a mortgage given by defendant to one

Edger on other lands; and he also stated that lot 59, in the second concession south of the Durham road, in Bentinck, was never the property of the defendant, but was conveyed by him to defendant's wife. All this land was mentioned in the schedule attached to the inquisition. He also stated that the jury were improperly selected and named at the instance of one Cochrane and Harper: that the enquiry was conducted improperly: that he (Hunter) was refused the right to examine the witnesses: that irregularities were permitted in communications to the jury: that the proceedings were conducted generally in an unfair and unjust manner towards the complainant, and that defendant had other property not returned, &c.

On the part of the Attorney-General affidavits were filed by the persons Cochrane and Harper referred to, and by all the jurors except one, negating and answering all the charges of irregularities, &c., alleged in the complainant's affidavit against the proceedings, and the enquiry before the sheriff.

In Michaelmas Term, 1869, *J. Patterson* shewed cause, citing *West* on Extents, 47, 91, 180, 193, 224-5; *Manning* Ex. Prac., 23, 25, 35, note *w*, 27, notes *c*, *d*.

*Lauder* supported the rule.

MORRISON, J., delivered the judgment of the Court.

I am of opinion that this rule should be discharged.

As to the first ground taken in the rule, I see nothing wrong in the issuing of the writ of extent now moved against. It was issued under the order of the learned Chief Justice, who also directed, for some good reason, that a previous writ issued should be set aside, and that Her Majesty might be at liberty to have another writ issued under the fiat previously made. No authority was cited to shew that such an order was improper. The fiat under which the writ issued was founded upon an affidavit stating, all that is necessary in such cases, viz: the debt due the Crown, in what manner it arose, and that it was in danger of being lost, and stating the fact that the defendant had absconded.

As to the second objection, it is shewn that the defendant is a debtor of the Crown, the Post-Office Inspector swearing that the defendant had entered into a bond to Her Majesty, one of the conditions, it appears by the bond, being that the defendant was to account for, and pay over all moneys received by him to Her Majesty's Postmaster-General, and that the defendant was a defaulter to the Crown for moneys collected by him in his capacity as postmaster in \$2,025.30.

Then as to the third objection, I do not think that the provisions of the 31 Vic., ch. 10, take away from the Crown the remedy by the writ of extent in matters appertaining to the Post-Office department, as contended for by Mr. Lauder. Sub-sec. 2 of sec. 89 enacts: "All suits to be commenced for the recovery of debts or balances due to the post-office, whether they appear by bond or obligation made in the name of the existing or any preceding Postmaster-General, or otherwise, shall be instituted in the name of the Postmaster-General."

The bond in this case is made to Her Majesty, and not to any Postmaster-General. I do not think that the words "or otherwise," as argued for the complainant, exclude the right of Her Majesty to proceed as in this case. In order to exclude such right (supposing that the words "or otherwise," were intended to cover bonds, &c., given to persons other than the Postmaster-General), Her Majesty should have been named in the section, otherwise she is not bound by the enactment. My own construction of the section is, that these words are used and intended to apply as if they followed the word "obligation."

Then as to the last ground taken in the rule, the affidavits filed on the part of the Attorney-General fully meet the objection.

On the whole, I think the rule should be discharged with costs.

WILSON, J., concurred.

RICHARDS, C. J., not having been present during the argument, took no part in the judgment.

*Rule discharged.*

# PATTERSON AND THE CORPORATION OF THE TOWNSHIP OF HOPE.

*Alteration of School Sections—Notice to parties affected—C. S. U. C. ch. 64, sec. 40.*

Section 40 of the Common School Act, Consol. Stat. U. C. ch. 64, enacts that a township council may alter the boundaries of a School Section, in case it clearly appears that all parties to be affected by the proposed alteration have been duly notified of the intended step or application.

In this case the only notice given was by the trustees of the section from which certain lots were taken by the alteration to the trustees of the section to which such lots were added—that being the notice which it was alleged had been customary in the township in similar cases.

*Held*, insufficient, and the by-law making the alteration was quashed. The by-law was passed in February, 1870, but the clerk of the Corporation did not notify the trustees of it until August—*Held*, that a motion to quash in M. T. 1870 was in time.

*T. M. Benson* obtained, during this term, a rule on the Corporation of the township of Hope, to shew cause why by-law No. 250 of the Corporation, amending by-law No. 222, and altering the boundaries of School sections 15 and 16, should not be quashed, on the ground that all parties affected by the alteration in the boundaries of School section 16 had not been before the passing of the by-law duly notified of the intended step or application for the passing of the by-law, or for the alteration of the said boundaries.

The by-law was passed on the 28th day of February, 1870. It enacted that lots 11, 12, 13, 14, and 15 in the 8th concession, and two acres of No. 14 and of No. 15 in the 7th concession, be added to School section 15, and then set out what section 16 should consist of, namely, eight lots in the ninth concession and eight in the tenth concession.

It appeared also that by-law No. 222 was passed on the 3rd June, 1868, and that section 16 had then within its limits the lots added by by-law 250 to school section 15.

It appeared from the affidavits and papers filed, that under the provisions of by-law No. 222, passed in June, 1868, the lots and parts of lots now separated by by-law 250 were added to school section 16, and that in the fall of that year the trustees of section 16 erected a school-

house at considerable expense, near the centre of the then increased section, to accommodate the portion of the section then added : that on the 27th of May, 1869, a number of the ratepayers of section 15 petitioned the township to pass a by-law to restore to that section the lands separated from it by by-law 222, and that on the 23rd of June, 1869, the inhabitants of section 16 petitioned the Council against taking any land from their section, and praying them to add thereto the north halves of lots 16 and 17 in the eighth concession. Nothing appeared to have been done with either of these petitions, except, according to the affidavit of the Clerk of the Council, that the first petition was ordered to be laid on the table.

A meeting of the Council was held on the 28th of February, 1870, at a place called "Welcome," which was complained of by the applicant as not being the usual place for the meeting of the Council, but it was shewn that it was advertised that a meeting would be held there. At such meeting a petition was presented of the trustees of school section 15, praying that the Council would pass a by-law "giving them back that portion of land taken from them:" that a notice of which the following is a copy, was also presented and filed: "To the Trustees of School Section No. 16, Township of Hope. The Trustees of School Section No. 15 will apply to the Municipal Council of this Township, at its first regular meeting, for the passing of a by-law to make our section equal, or nearly so, in valuation with other sections in the township, by giving back that portion taken from our section by the Locking (a) Council, or any part that the Council in their judgment may think proper. By order of the Board of Trustees. Dated 18th February, 1870. (Signed) S. T. Martin, School Trustee," with seal attached.

It appeared that this notice was served on one of the trustees of section 16, on the 18th February, 1870, but the trustees swore they were not aware of the meeting of the

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(a) *Sic.*—Mr. Locking was the Reeve at the time the notice was given.

Council or where it was to be held until the 25th: that on the 28th February two of the trustees of number 16 attended the meeting of Council at Welcome, and addressed the Council against any alteration, and urged the Council to allow the matter to stand over until notice could be given to the parties affected by the proposed alteration, and stated that they had not had time to call a school meeting or notify the parties, and requested a month's delay to enable them to do so: that the Council refused to postpone the by-law, the Council deciding, as the Reeve swore, that of the then application sufficient notice had been given; and the Council, after considering the object of the application and the two former petitions already referred to, passed the by-law 250.

It appeared that there were 46 residents within the section 16, and out of these thirty filed affidavits swearing they had no notice of any intended step or application to be made for the alteration during the year 1870 of their section, until after the by-law was passed, and that no notices were ever given or posted up. On the part of the Corporation it was not contended that any other specific notice was given except the notice to the trustees. The affidavit of the Reeve and others stated that the usual mode of giving notice in cases of alteration of sections in the township was the giving of a notice by the trustees of the section from which the lands were to be taken, and that the sufficiency of such a notice had been discussed from time to time by the Council on previous occasions of alteration of sections, and that such a notice from one set of trustees to the other was held to be sufficient, and was so treated in the alteration of boundaries.

The Secretary-Treasurer of the school trustees of section 16 swore that the first and only notice he had of this application of the school trustees of section 15 was the written notice referred to, and that the freeholders and householders in the section were wholly ignorant of the intended step or application until the by-law had passed; and he further swore that a large majority of them were opposed to

the alteration, and that this application to quash the by-law was made at the instance of and under a resolution passed at a meeting of the inhabitants of the section.

*Armour*, Q. C., shewed cause, citing Consol. Stat. U. C. ch. 64, sec. 40, 23 Vic. ch. 49; *Taylor and the Corporation of West Williams*, ante p. 337; *Ness and the Municipality of Saltfleet*, 13 U. C. R. 408; *Ley and the Municipality of Clarke*, 13 U. C. R. 433; *Shaw and the Corporation of Manvers*, 19 U. C. R. 288; *Griffiths v. the Municipality of Grantham*, 6 C. P. 274; *Cotter and the Municipality of Darlington*, 11 C. P. 265; *Isaac and the Municipality of Euphrasia*, 17 U. C. R. 205.

*C. S. Patterson* supported the rule.

MORRISON, J., delivered the judgment of the Court.

It is to be regretted that the council did not accede to the request of the trustees to postpone the consideration of the by-law for the month. There was abundance of time after February for the consideration and passage of the by-law, as it could not come into force before the 25th December, 1870. The parties interested would then have had sufficient notice and this litigation would have been avoided.

The only question for our consideration is, whether the parties affected by this alteration had due notice of the intended step.

Section 40 of the Common School Act, Consol. Stat. U. C., ch. 64, enacts:—"In case it clearly appears that all parties to be affected by a proposed alteration in the boundaries of a school section have been duly notified of the intended step or application, the township council may alter such boundaries."

No doubt the council can make such an alteration as they have done in this case without any request from any quarter, and even against the will of the majority of the section, but they cannot do so without first notifying the parties affected by such alteration; they must give them

an opportunity of being heard : *Ley and the Municipality of Clarke*, 13 U. C. R. 435. And, as said by Burns, J., in *Shaw et al. and the Corporation of Manvers*, 19 U. C. R. p. 294, "The giving of notice is a condition precedent to the council entertaining the application, and this provision must apply as well to the repeal of a law" (as in this case) "which would of itself constitute an alteration, as of a notice in the first case of making a change."

It is not pretended that the parties affected by the alteration (with the exception of the two trustees), had notice of the intended application made by the trustees of section 15, or of any step that the Council were about to take, or of their intention to consider the petition presented in June of the previous year, or the by-law in question—the Council, so far as notice was concerned, relying on an alleged custom in the Township, that a notice by one Board of Trustees to another Board was a notice to all the inhabitants of the section affected. Now the language of the statute leaves no doubt as to the intention of the Legislature, for the 40th section says: "In case it clearly appears that *all* parties affected," &c., "have been duly notified," &c., "the Council may," &c. How or in what way notice may be given is not stated. I do not think that a notice to two trustees, as such, is a compliance with the statute. If such was the intention, we may suppose the Legislature would have said so. As to what the Legislature considered notice in other cases, may be found in the 8th, 21st, and 26th sections of the Act, namely, the posting of notices at least in three public places in the section, and at least six days before, &c.; and it seems to me that by analogy such a notice would be sufficient in cases like the present.

On the whole, we are of opinion that the parties affected by the alteration had not due notice of the intended alteration made by this by-law, and that upon that ground it should be quashed.

During the argument it was suggested that from the fact of petitions being presented to the Council in May and

June, 1869, for and against such alteration, and which petitions were signed by a large number of the inhabitants of both sections, we might assume that the parties interested had sufficient notice; but as it appears no action whatever was taken on these petitions by the then council, and that it was only in the end of February, 1870, after a new council had been elected, and upon a new application of the then trustees of section 15, that these petitions were referred to by the council, and then without any notice to the petitioners that they would be taken up or considered, we could not under such circumstances assume that the parties had the notice required by the statute.

It is also contended that this application should have been made at an earlier period, but it appears from the affidavits filed on the part of the corporation that the clerk of the council did not notify the trustees of the passage of the by-law until the month of August last, and between that time and last term the applicant had no opportunity of moving to quash the by-law.

We therefore think the rule should be made absolute with costs.

*Rule absolute.*

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### MCINNES V. MILTON.

*Note signed in blank—Liability.*

Where the defendant signed, as maker, a printed form of a promissory note, and handed it to A., by whom it was filled up for \$855, and the plaintiffs afterwards became endorsees of it for value without notice: *Held*, that the defendant was liable, though it might have been fraudulently or improperly filled up or endorsed.

ACTION by plaintiff, as endorsee of a note for \$855.60 made by defendant, payable to the order of H. R. Sharpe & Co., and endorsed by them to W. A. Sharpe. The note was dated 1st December, 1868, and payable forty-five days after date.

Plea. *Non fecit.*

At the trial, before Wilson, J., at the Hamilton Spring Assizes, 1870, without a jury, it appeared that the defendant had had some small transactions with the firm of H. R. Sharpe & Co., and also with W. A. Sharpe, who was a member of the firm, but the evidence went rather to shew that the defendant had settled and paid the amounts due to both. One of the principal points at the trial was whether the signature to the note was in the defendant's writing. He swore he never signed it. The learned judge was satisfied, from all the evidence, that the signature was the defendant's. It further appeared that the note was originally a blank printed form of note when the defendant put his name to it: that W. A. Sharpe, who was ill at the time and shortly after died, directed his brother, who was called as a witness, to fill up the note, as it appeared at the trial: that the intention was to get the note discounted, which the witness failed in doing: W. A. Sharpe then directed the witness to take it to Hamilton, where the plaintiff carried on business, and retire with it paper in the hands of the plaintiff, falling due on the 4th December, of the firm of H. R. Sharpe & Co., endorsed by W. A. Sharpe, which the witness did, and in that way the note came into the hands of the plaintiff. It was also in evidence that, although the defendant denied the making of the note, he admitted that he made accommodation notes for W. A. Sharpe.

The defendant was called, and he denied that he ever signed the note or signed a blank note, or authorized any one to fill up the note in question.

At the close of the case the defendant's counsel submitted that the plaintiff failed, as there was no authority shewn to fill up the note for the amount in question, or in the name of the payees; and he contended that it lay on the plaintiff to prove such authority. The plaintiff contended that it appearing that the defendant left with W. A. Sharpe a blank note, he entrusted him to fill it up for the amount.

The learned Judge ordered a verdict for \$922.17, and as there was no authority shewn to fill up the note for \$850,

he reserved leave to defendant to move to enter a nonsuit, in case the court should be of opinion that the affirmative proof of authority was on the plaintiff, or that the defendant's evidence met any *primâ facie* case against him by his signature in blank.

In the following Easter Term, *S. B. Freeman, Q. C.*, obtained a rule *nisi* to enter a nonsuit on the leave reserved, on the ground that it was shewn that the body of the note was not written by the defendant, and no authority was shewn to have been given by him to any person to fill up or write the body of the note over his signature.

*Burton, Q. C.*, shewed cause, and cited *Russel v. Langstaffe*, 2 Doug. 514; *Schultz v. Astley*, 2 Bing. N. C. 544; *Awde v. Dixon*, 6 Ex. 869; *Montague v. Perkins*, 22 L. J. N. S. 188, C. P.

*Freeman, Q. C.*, supported the rule.

MORRISON, J. delivered the judgment of the court.

In this case we are of opinion that the rule must be discharged.

It appears, from the evidence at the trial, that the defendant admitted he had given on occasions accommodation notes to W. A. Sharpe. He swore, however, that he never signed the note in question in blank. The evidence fully warranted the learned Judge in arriving at the conclusion that the defendant's signature was to the note.

What Mr. Freeman contended for on the argument was, admitting it to be the defendant's signature, yet that there was no evidence how it came into the possession of W. A. Sharpe, who directed his brother to fill up the note as it now appears; that there was no proof that the defendant gave it to W. A. Sharpe, or that he came by it honestly; and for all that appeared, the blank may have been stolen from the defendant.

In a late case of *Foster v. Mackinnon*, L. R. 4 C. P. 704, in which the questions of an endorsement obtained by a fraudulent representation that it was a guarantee the de-

defendant was signing, and negligence and laches on the part of the person signing his name were fully discussed, Byles, J. in giving judgment, referring to negotiable instruments, says: "These instruments are not only assignable, but they form part of the currency of the country. A modification of the general rule is necessary to protect innocent transferees for value. If, therefore, a man writes his name across the back of a blank bill-stamp, and part with it, and the paper afterwards is improperly filled up, he is liable as endorser. If he write it across the face of a bill, he is liable as acceptor, when the instrument has once passed into the hands of an innocent endorsee for value before maturity, and liable to the extent of any sum which the stamp will cover."

The present case is not that of a man writing his name on a blank sheet of paper, as suggested in *Foster v. Mackinnon*, but this defendant put his name to the printed form of a promissory note, with blanks for the amount, date time, and names, and it is quite clear he intended putting his name to a note; and if he gave the blank so signed by him to W. A. Sharpe, of which there is evidence from which we may assume that he did, then, as held in *Montague v. Perkins*, 22 L. J. C. P. 187, when he put the blank note into W. A. Sharpe's hands he gave him power to issue it, as if he had a general and unlimited authority, and entitled him to represent himself to the world as acting with a general authority, and he cannot say to a *bonâ fide* holder for value, who has no notice, that there were secret stipulations between himself and the agent.

And in *Awde v. Dixon*, 6 Ex. 869, Parke, B. said: "I do not gainsay the position that a person who puts his name to a blank paper impliedly authorizes the filling of it up to the amount that the stamp will cover."

Then as to the suggestion that it is not shewn that W. A. Sharpe came honestly by it, or that the blank may have been stolen.

In *Harvey v. Towers*, 6 Ex. 656, where there was a plea of fraud, without alleging that the plaintiff gave no value

for the bill, Pollock, C. B., in giving judgment, said : " In point of law, the latter allegation is necessary to make the plea good ; for notwithstanding the bill may have been concocted by fraud, or stolen, or the party may have been swindled out of it, that is no defence, unless the holder obtained it without value."

And in *Watson v. Russell*, 31 L. J. Q. B. 304, also reported in 3 B. & S. 37 ; Cockburn, C. J. says : " I consider the law to be now quite settled, that if a person puts his name to a paper, which either is, or by being filled up or endorsed may be, converted into a negotiable security, and allows such paper to get into the hands of another person, who transfers the same to a holder for consideration and without notice, such party is liable to such *bonâ fide* holder, however fraudulent or felonious, as against him, the transfer of the security may have been."

These authorities shew very clearly that it is settled law, in favor of the negotiability of bills and notes, and to protect innocent holders for value, that when a person puts his name to or on a bill or note, and gives or entrusts the blank so signed to another, that other has a general authority to fill in the blanks as he may choose, and to an unlimited amount, and that the party so signing is liable upon the note or bill so filled up in the hands of a *bonâ fide* holder for value, no matter upon what private understanding or terms the blank was signed or parted with ; that if the authority to fill up the blank was a conditional or limited one and not followed, the proof of the condition or limitation, and notice to or knowledge of the same by the holder, is cast on the defendant before he can relieve himself from liability.

In this case there is no pretence that the note did not *bonâ fide* pass into the hands of the plaintiff for value, and without any notice of the circumstances under which it was signed. The evidence, as already stated, warranted the learned judge in deciding that the defendant signed the blank, and that he gave or entrusted it to W. A. Sharpe,

who afterwards filled it up and endorsed it to the plaintiff. Such being the case the defendant is liable, and the rule must be discharged.

*Rule discharged.*

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### LOCKRIDGE V. LACEY ET AL.

#### *Tender—Demand of receipt.*

Where on tendering payment of money due upon mortgage a receipt was required, and the plaintiff did not object on that ground, but gave a different reason for refusing to receive the money. *Held*, that the tender was good.

The above tender was made on the 14th April, the day when the money fell due, and on the following day it was again tendered, and refused because a receipt was insisted upon.

*Held*, not to support the plea of tender on the 14th, for it was after the day; but that, to avoid the effect of the previous tender, the plaintiff should have demanded the exact sum before offered.

*Per Morrison J. and Wilson, J.*, a person tendering money is entitled to require a receipt: *Richards, C. J.*, doubting.

APPEAL from the County Court of Lennox and Addington.

The action was brought on the covenant contained in a mortgage made by the defendants to the plaintiff, for non-payment of three instalments of \$200 each, with interest from the 14th of April, 1865, the last instalment being due and payable on the 14th April, 1870.

The defendant pleaded a tender of \$260, being the full amount of the last instalment and interest, on the 14th of April, 1870, with pleas of payment, &c., except as to the \$260; and the plaintiff joined issue on the pleas.

Upon the trial it was contended that all the instalments except the last were paid, and the question turned upon the plea of tender. The witness who made the tender stated, "I tendered plaintiff on the 14th of April, 1870, \$260 in bills. He said he would take no money nor give any more receipts until I produced all the receipts given to the defendants on the mortgage. I tendered the same money

on the following day, 15th April ; I said I would give the money if he would give a receipt ; he refused to sign a receipt ; I insisted upon a receipt on the same occasion, and on the first day also."

A witness present on these occasions testified that he counted the \$260, and that the plaintiff refused to accept it ; he said there were some disputed receipts ; the last witness said " Take the money and give a receipt " ; plaintiff refused. On the 15th April the plaintiff offered to take the money, but Lacey would not give it unless the plaintiff would give a receipt, which he produced. What the receipt was did not appear, but from the statement in the learned Judge's judgment it was such that no objection could be or was taken to it.

The plaintiff was called in reply, but gave no evidence about the tender or any subsequent demand.

A verdict was entered for the plaintiff for \$260, with leave to defendants to move to enter a verdict for them, if the above evidence shewed the tender was sufficient in law.

A rule *nisi* was subsequently obtained in pursuance of such leave, and after argument was made absolute to enter a verdict for the defendants, whereupon this appeal was brought.

*F. Osler*, for the appellant. The demand of a receipt was unauthorized, and made the tender bad : *Bennett v. Parker*, Ir. L. R., 2 C. L. 89 ; *Cole et al. v. Blake*, Peake 179 ; *Laing v. Meader*, 1 C. & P. 257 ; *Richardson v. Jackson*, 8 M. & W. 298, 9 Dowl. 715 ; *Sanford v. Bulkley*, 30 Conn. 345, 349. A tender must be unconditional : *Western Assurance Co. v. McLean*, 29 U. C. R. 61 ; *Glasscott v. Day*, 5 Esp. 48 ; *Higham v. Baddeley*, Gow 213 ; *Ryder v. Townsend*, 7 D. & R. 119.

*K. McKenzie*, Q. C., contra. The case was left to the Court below with a discretionary power to decide upon the evidence, and under such circumstances the finding of the Judge is conclusive. It was a proper question upon the evidence whether the tender was conditional or

unconditional : *Eckstein v. Reynolds*, 7 A. & E. 80 ; *Manning v. Ashall*, 23 U. C. R. 302 ; *Harris v. Robinson*, 25 U. C. R. 247. Moreover nothing but a question of costs is now involved, for the money has been paid into court and taken out ; and on such a question the court will not interfere on appeal : *Kerby v. Elliott*, 13 U. C. R. 267. The demand of a simple receipt or acknowledgment of the payment, accompanied by no admission beyond this, will not avoid a tender, and no case has so decided ; this is not a condition within the meaning of the rule that a tender must be unconditional. As to the tender on the 15th, the plaintiff to avoid it should have shewn that he demanded the \$260 and was refused : *Spybey v. Hide*, 1 Camp. 181.

*Osler*, in reply. *Kerby v. Elliott* was a case upon special demurrer. This is a motion to change the verdict.

MORRISON, J.—The first point to be determined is, whether the tender on the 14th April was a good tender. The verdict at the trial shews that the amount due on the mortgage was the instalment and interest, \$260, payable on that day. This amount was offered to the plaintiff and he refused to take it, saying he would take no money until the witness produced to him all the previous receipts given by him to the defendants. The other witness states that on that occasion the plaintiff refused to accept the amount on the ground that there were some disputed receipts. The witness who tendered the \$260 further stated that he required a receipt for it. The plaintiff did not object to the tender on the ground that it was coupled with any condition or the giving of a receipt, but refused the amount solely on the ground that the plaintiff required the production of former receipts, which I take to mean that he claimed a larger sum as due on the mortgage, just as he did in this action, and which he could shew by the production of such receipts.

The fact that the defendants' agent required a receipt did not destroy the tender of \$260, if the plaintiff did not

The fact that the defendants' agent required a receipt did not destroy the tender of \$260, if the plaintiff did not object to the formality of the tender on account of the receipt being demanded.

In *Cole et al. v. Blake*, Peake 179, it appeared that the plaintiffs were not entitled to more than ten guineas, a tender of which was pleaded. The witness who proved the tender said he believed he had asked for a receipt in full, and added that he should not have paid the money unless the plaintiffs would have given such a receipt. He said further, the plaintiffs insisted on payment of a larger amount, and did not object to the formality of the tender on account of the receipt being demanded. Lord Kenyon was clearly of opinion that the tender was proved, saying that "the dispute between the plaintiffs and the witness was not whether a receipt should be given or not, but whether the sum tendered was sufficient; and, as it clearly appeared on the plaintiffs' own evidence that the sum tendered was sufficient to satisfy the whole demand, he was of opinion the defendant was entitled to a verdict on the plea of tender."

And in *Lockyer v. Jones*, following this case in the same volume, in which a £10 Liverpool bank bill of exchange was tendered and refused, the plaintiff insisting on a larger amount, it was contended it was no legal tender, but Lord Kenyon said, the plaintiff was precluded from objecting to the legality of the tender by his conduct at the time it was made; he did not then object to it on account of the form in which it was made; had he objected to it on account of its informality the defendant might have taken the money from his pocket, and tendered that.

In *Bull v. Parker*, 2 Dowl. N. S. 345, the evidence of the tender was a witness who proved he had gone to the plaintiff on behalf of the defendant; and he said, "I offered him £4, and I said I went by the direction of the defendant, to pay him £4 in full discharge of his account; I laid down the money before the plaintiff; he said he should not take it." It was objected that it was clogged with a con-

dition. Wightman, J., in giving judgment said, after referring to the case of *Henwood v. Oliver*, 1 Q. B. 409 : " Here, though it is true the words were not the same, yet, as the case was not left to the jury, nor any objection made on the part of the plaintiff to the tender when it was proposed, I should take it that there was no such condition annexed to it when made as would make it amount to this, ' unless you accept this money in full discharge I will not pay it at all.' The plaintiff refused to take it because it was too little ; he did not object to the form of the tender, nor to the fact of his being called on to accept the money in full discharge. I think, therefore, that the defendant is entitled to a verdict on this issue."

And in *Richardson v. Jackson*, 8 M. & W. 298, referred to in the judgment of the Court below—where the witness put the money on a table and said, " Here is the money, give me a receipt for it"—Parke, B., said, " I am of opinion that this rule ought to be discharged. The case of *Cole v. Blake* is a sufficient authority to warrant the Court in disposing of this application. There Lord Kenyon says undoubtedly ' that it had been determined that a party tendering money could not in general demand a receipt for the money.' But where no objection is made on that account, but the creditor refuses the money because he considers the amount is not sufficient, Lord Kenyon held that he could not afterwards object to the tender because the party making it required a receipt. Here it appears the jury were satisfied that the sum tendered was sufficient to satisfy the plaintiff's demand." And the court discharged the rule.

I may also refer to a late case, *Scott v. The Uxbridge and Rickmansworth R. W. Co.*, L. R. 1 C. P. 596, where the amount was tendered under protest, and the plaintiff refused to receive it unless the written protest was withdrawn or the plaintiff allowed to state in his receipt that he received it not under protest. The Court held the tender good.

Upon the authority of these various decisions, I am of

opinion that the tender of \$260, made on the 14th April, was a good tender.

It is, however, necessary to consider the effect of what took place the following day, when the defendants again voluntarily made another offer to the plaintiff of the money if he would give him a receipt, which the plaintiff refused to sign, a witness saying that the plaintiff offered to take the money, but that the agent would not give it unless he signed the receipt which the agent produced, which from the learned Judge's judgment was a mere acknowledgment of the payment of the sum on account of the mortgage. I do not consider this offer as a tender. The learned Judge in the Court below appeared to treat it as such, as well as counsel on the argument. The offer was only one of paying the amount if the plaintiff would sign a receipt for it. This action is for breach of contract in not paying the amount on a certain day, the 14th, and if the tender made on the 14th was not a good tender a tender after that day would be a tender *post diem*. The effect of the issue taken on defendant's plea was not referred to in the argument. The plea is the usual plea of tender on a particular day, the 14th April, on which the plaintiff took issue.

In B. & L. Prec., 3d Ed., 695, note, it is laid down that a replication taking issue on the plea puts in issue both the the readiness and willingness of the defendant to pay, as well as the tender. And it is laid down in the authorities, when a tender is proved, as in this case, of a specified sum of money, and which tender is a good bar shewing that the plaintiff had done all he could to perform his part of the contract, that to avoid the effect of such a tender it is necessary that the plaintiff should prove a subsequent demand of the same precise sum previously tendered, and a refusal; *Spybey v. Hide*, 1 Camp. 181, where Lord Ellenborough held that a creditor, to do away with the effect of a tender, must demand only the sum before tendered, or the debtor would be put to the necessity of repeated tenders, and would be thus harrassed to no sort of purpose. And see *Fabian v. Winston*, Cro. Eliz. 209.

Now there is no question that no actual subsequent demand was made by the plaintiff on the defendants. It is true that the defendants' agent on the following day of his own accord offered the money to the plaintiff if he would give him the receipt referred to, which the plaintiff declined to do, although willing to take the money; but the plaintiff made no specific demand, and did not act or say anything with a view or for the purpose of avoiding the tender of the day before by demanding the precise sum so previously tendered. If he had done so, the agent might have paid the plaintiff the money unconditionally. The conduct of the plaintiff under the circumstances rather indicates that he claimed a larger sum as being due to him, and that his willingness to take the money was a mere reception of it with the object of applying it or a portion of it towards discharging an unfounded claim of some alleged balance due on previous instalments, and not as payment of the instalment due the day previous, and which was the only amount found and in fact due. The plaintiff's conduct in effect, if it was evidence of any new demand at all, was that of a demand of a larger amount than the sum previously tendered, and the plaintiff failed to falsify the averment of *toujours prist*.

The principle is laid down by Wilde C. J. in giving judgment in *Dixön v. Clark*, 5 C. B. 378; "If the demand were of a larger sum than that originally due under the contract, a refusal to pay it would not falsify the *toujours prist*, even though the amount demanded were made up of the sum due under the contract and some other debt due from the defendant to the plaintiff. \* \* This principle however, we think, is only applicable where the larger sum is demanded *generally*, and can hardly be enforced where it is explained to the defendant at the time how the amount demanded is made up; for in such case the transaction appears to be nothing less than a simultaneous demand of the several debts, so as to falsify the averment of *toujours prist* as to each. But besides the averment of *readiness* to perform, the plea must aver an actual *performance* of the

entire contract on the part of the defendant, as far as the plaintiff would allow. And it is plain that where, by the terms of it, the money is to be paid on a future day certain this branch of the plea can only be satisfied by alleging the tender *on the very day*."

On the whole, we do not think that there was a subsequent demand of the precise sum and refusal shewn, to falsify the defendants' continual readiness and willingness to pay, and so avoid the plea altogether.

But even if the subsequent demand of the specific sum of \$260 could be considered substantially proved as being made on the 15th April, and that the amount was again offered to the plaintiff upon his giving a receipt for it, such a receipt as I assume was demanded here, viz., simply acknowledging the payment of so much money, and that the money was not paid because the plaintiff refused to give such a receipt, we ought not to hold that a demand and refusal under such circumstances avoided the defendants' plea, for in my judgment the defendants were entitled in this case to require and have such a receipt on payment of the money.

The principle running through all the reported cases, and referred to in the text books, upon which a tender of money accompanied with a demand of a receipt for it is rendered conditional and bad, is, that the receipt required in its terms involved some admission besides the receipt of the money, and which might be used as evidence to bar a claim for any amount beyond the sum tendered—such as a receipt in full, or in settlement, or of all demands, &c. ; but I find no case or dictum going the length of deciding or saying that a tender would be bad because a mere receipt for the amount of the money tendered was requested.

In *Cole v. Blake*, already referred to, Peake 179, the receipt spoken of was one in full, and Lord Kenyon in stating his opinion used this qualification, "that it had been determined that a party tendering money could not in general demand a receipt for the money." And in *Richardson v. Jackson*, decided on the authority of *Cole v. Blake*, Parke,

B., quotes the words of Lord Kenyon,—Rolfe, B., saying, “I should be sorry to hold this to be a bad tender on account of the receipt having been mentioned. I should wish to encourage all prudent people to take receipts, for if they do not, in case of death the representatives may be deprived of all evidence of the payment.”

And Mr. *Roscoe*, in his work on Evidence, 484, in citing this last case says, it cannot be considered as clearly settled that a tender requiring a receipt is not a good one.

And in *Smith's Mercantile Law*, 5th ed., 508, the author says, “The debtor's duty is to tender payment at the proper time; \* \* the creditor's to receive it and make him a proper acquittance;” and on page 510, “Nor is a tender good if accompanied by a condition, as \* \* a receipt in *full* given.” And on page 523 “It seems doubtful whether the debtor had, at common law, a right to demand a receipt on payment, excepting from the King's receiver.”

It seems to me only reasonable and in accordance with sound policy, that a person upon paying money, particularly upon a mortgage, should be entitled to an acknowledgment in writing from the party to whom it is paid, if for no other purpose than the avoidance of disputes. It cannot in any way work a prejudice to the party giving it. It can hardly be said that the requiring of a mere unconditional receipt is imposing any condition on the creditor. If the tender is accompanied with a request of a receipt in any terms that would supply evidence of an admission that no more was due, the creditor would not be bound to accept the money, as it is obvious the offer would be conditional, and therefore bad.

In *Bowen v. Owen*, 11 Q. B. 133, Lord Denman says if persons tendering “merely propose that the creditor should take the sum offered, and leave it open to him to persist in his claim for more, such a tender is free from objection; but if a party says, ‘I will not pay this money unless you give a receipt for it as the whole amount due,’ that is no legal tender.”

I take it that if the debtor's proposition to the creditor

is in effect to take the money and give him a receipt for the amount, leaving it open to the creditor to claim more, that it would be a good tender. I cannot distinguish in principle the demand of a receipt or the tender of an amount in payment of a debt, or, as in this case, in discharge of a covenant to pay money on a mortgage, from what is enunciated in *Sheppard's Touchstone*, 388: "If one be bound to pay money at a day certain by a single obligation or bill, and the obligor tender the money at the day to the obligee, so as he will give him his bill, or a release for the money, and the obligee refuse so to do, and thereupon he doth refuse to pay the money; in this case the obligation is not forfeit; for, in this case, the obligor is not bound to pay the money, unless the obligee will give up his bill, or give him a release."

On the whole, I am of opinion that the appeal should be dismissed with costs.

RICHARDS, C.J.—I concur in dismissing the appeal. My brother Wilson, I believe, agrees with my brother Morrison in thinking that a person paying may demand a receipt; but I doubt as to this, for the payee may be unable to write, and how can you impose a condition which forms no part of the contract to pay?

*Appeal dismissed.*

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THE CHIEF SUPERINTENDENT OF EDUCATION FOR UPPER CANADA (NOW ONTARIO), APPELLANT; IN THE MATTER BETWEEN WILLIAM ANSON SHOREY, PLAINTIFF, AND JOSEPH THRASHER, THOMAS DAVEY, AND ALBERT JONES, DEFENDANTS.

*School Sections—Boundaries of—Construction of By-law—Map.*

The question being whether the plaintiff's lot, 23 in the 8th Concession of Thurlow, was within School section 16, a by-law defining the limits of sections in the Township was proved, which declared the section to be composed, among other lots, of "50 acres of the east side of lot No. 16, all of No. 17, S.  $\frac{1}{2}$  of No. 18, all of 19, 20, 21, 22, 23, and 24," (not giving the concession), excepting such portion of last mentioned lots as included in sections 18 and 19." Section 18, by the same by-law, was made to comprise parts of lots 16, 18, 20, 21, and 22, in the 8th concession; and section 19 the N.  $\frac{1}{2}$  of 24 in the same concession. *Held*, that the whole by-law taken together sufficiently shewed the plaintiff's lot to be in section 16.

*Held*, also, that the map prepared by the Township Clerk, under section 49 of the School Act, C. S. U. C., ch. 64, shewing the division of the Township into sections, was admissible as evidence.

THIS was an appeal by the Chief Superintendent of Education against a decision of the Judge of the Fifth Division Court of the County of Hastings.

An action of trespass was brought by *Shorey* against *Thrasher* and others in the Division Court, to recover damages for an alleged wrongful seizure and sale of a cow of the plaintiff by the defendants.

The case was tried in May last before the Judge of the County Court of Hastings.

The defendants' contention at the trial was, that they were the trustees of School Section No. 16 in the Township of Thurlow: that the plaintiff was a rate-payer within that school section, and refused to pay his school tax, whereupon they issued a warrant to levy the amount, under which warrant the cow in question was seized, &c. The plaintiff contended that his lot, No. 23 in the eighth concession, was not shewn to be within the limits of school section 16.

In order to shew the limits of 16, the defendants put in

a by-law No. 28 of the Municipal Council of Thurlow. "For the better defining and establishing of the boundaries of school sections in the Township of Thurlow," passed on the 22nd of December, 1859, which by-law defined and described the limits of all the school sections in and embracing the whole township. A map was also produced, in reference to which the Clerk of the Municipal Council swore, that he found it filed among the papers of the Council when he was appointed clerk, and that it so came into his hands as such clerk. He further said that he first saw this map in 1860, when he was a member of the Council. By that map, he stated that the plaintiff's lot, 23 in the eighth concession, was in section 16. The map, which was produced at the argument, had all the various school sections accurately laid down on a scale, the limits of each section being distinguished by a different color from the adjoining sections, and bore date, Thurlow, December, 1859, and was entitled "Plan of the Township of Thurlow, shewing the boundary of the several school sections in said Township, correctly laid down by a scale of 40 chains to an inch, by *John Emerson*, Provincial Land Surveyor." A reference to this map alone shewed the plaintiff's lot within the limits of section 16.

By the 16th clause of the by-law the limits of section 16 were set out as follows: "School section No. 16 to be composed of that part of lots Nos. 11, 12, 13, 14, 15, 16, and west part of No. 17, lying north of the river, in the sixth concession; all of lots Nos. 14, 15, 16, 17, north half of 18 and 19, in the seventh concession; also *50 acres of the east side of lot No. 16, all of No. 17, south half of No. 18, all of 19, 20, 21, 22, 23, and 24, excepting such portion of last mentioned lots as included in sections Nos. 18 and 19.*"

The learned Judge was of opinion that the plaintiff's lot was not shewn to be in the section, and he decided on that ground that the plaintiff was entitled to recover, and he ordered a verdict for \$28. Against that decision this appeal was brought, under Consol. Stat. U. C., chap. 64, secs. 108-113.

The grounds of the appeal were, that it sufficiently appears from the by-law of the Township Council, passed on the 22nd of December, 1859, and the Township map, dated December, 1859, that lot 23 in the eighth concession of Thurlow, on which the plaintiff resided, is within the boundaries of school section 16 of said Township, and that the plaintiff as owner or occupier thereof is liable for the school rates levied by the trustee corporation of said section. 2. That the plaintiff acted under the by-law as trustee of the school section, and signed returns relating to the same as such trustee, and is bound by his acts and declarations then made. 3. That the rate in question having been levied by a trustee corporation *de facto*, cannot be recovered back in this action.

Two other cases were appealed of a similar character. *Latta v. The same defendants*, and *Graham v. The same defendants*, the grounds of appeal being the same, the only difference being in the Nos. of lots, viz: in *Latta's* case, the south half of lot 22 in the eighth concession; and in *Graham's* case, the south half of 24 in the eighth concession, of Thurlow.

*T. Hodgins*, for the Chief Superintendent of Education in Shorey's and Latta's cases, cited *Simmons* and *the Corporation of Chatham*, 21 U. C. R. 75; *Gill v. Jackson et al.*, 14 U. C. R. 127; *Dwarris* on Statutes, 628. *Henderson* (of Belleville) for the Chief Superintendent of Education in Graham's case.

*Diamond*, for the respondents, cited *Haacke v. The Municipality of Markham*, 17 U. C. R. 562; *McGregor v. Pratt*, 6 C. P. 173.

The facts of the case and the arguments of counsel sufficiently appear in the judgment.

MORRISON, J., delivered the judgment of the Court.

The principal question raised in these three cases is, whether the respective lots in which the several plaintiffs lived are within the limits of school section 16.

It was contended by the respondents that to the by-law alone we must look to ascertain the boundaries of the sec-

tion in question, and it was further argued that the by-law did not shew that the plaintiff's lot, 23 in the eighth concession, formed part of school section 16, and that the learned Judge below was right in so holding.

Assuming that the map could not be looked at to throw any light on the by-law, we think there is sufficient stated in the by-law to shew that the plaintiff's lot was within the limits of section 16. It is quite apparent that the person who drew or engrossed the by-law omitted to insert the words "in the eighth concession," after and between the figures 24 and the words of exception at the end of the 16th clause, viz: "excepting such portions of last mentioned lots as included in sections 18 and 19."

Upon examination of the clauses defining sections 18 and 19 in connection with clause 16, the effect of the omission of the number of the concession may be avoided, and the limits of the 16th section and the omitted concession intelligibly ascertained. Clause 16 of the by-law declares that the 16th school section consists of certain lots in certain concessions, and also 50 acres on the east side of lot 16, &c., omitting the concession, excepting, &c., included in sections 18 and 19. Clauses 18 and 19 of the by-law describe sections 18 and 19: that of 18 to consist of, with other lots, 150 acres of the west side of No. 16, north half of 18, certain portions of lots 20, 21, 22, in the eighth concession; and in section 19 is included the north half of 24 in the same concession. It seems to me clear that, as we have first to ascertain what lots are included in sections 18 and 19 to determine a portion of section 16, and we find included in 18 150 acres of the west side of 16, north half of 18, parts of 20, 21, 22, passing over whole lots 17, 19, and 23, all in the eighth concession, and in section 19 part of 24; and as forming part of section 16, we find the corresponding portions of 16, 18, and also portions of the other lots mentioned, and as these were the only lots distinguished by like numbers in 18 and 19, and described as being in the eighth concession, and are the only lots by numbers to which section 16 could have any relation or be

connected with in those sections, there can be little doubt what lots are within section 16, and that the lots in question were intended for and are lots in the eighth concession. If the 16th section stood alone, without any reference to sections 18 and 19, it would have been uncertain, but the reference to the 18th and 19th sections is a key to its meaning, and with the aid of a plan of the township, without any sections delineated on it, this section 16 would be clearly made out and distinguished as including within it the lots contended for by the appellants.

We are therefore of opinion that the lots in question are sufficiently shewn by the by-law itself to be within school section 16, and that the appeal upon that ground should be allowed.

With regard to the map produced from the clerk's office, it is shewn that it came from the proper custody, and that it is the map which the 49th section of the school act, Consol. Stat. U. C. ch. 64, requires the township clerk to prepare in duplicate for the use of the county council and the township clerk's office, and in our opinion it ought to be received as *prima facie* evidence as shewing the limits of the various school divisions. The only object of having such a map prepared and kept as enjoined by the statute, is to afford the municipalities, trustees, and all parties interested the means of ascertaining and knowing what lots and portions of lots are within the respective sections, and to enable the assessor to perform the duties cast upon him by the 33rd section of the school act, of returning the lands of any person situate within the limits of two or more school sections separately on the roll according to the division of the school sections. The preparation of the map is a statutable duty imposed on the clerk. The map becomes a public document openly and publicly kept and used, and is entitled to confidence as such, and to be received as *prima facie* evidence of what it purports to shew.

The respondent's counsel contended that, assuming that the learned Judge erroneously decided that it did not

appear that the lands were within section 16, that still the plaintiff was entitled to recover, on the grounds that the trustees were not duly elected, and also that the warrant was bad and unauthorized. The learned Judge below gave no judgment on these points. We are unable to see in what respect the election was invalid or the warrant defective, or void. On looking carefully over the evidence we find that at the usual annual meeting in January, 1867, defendant Thrasher was elected a trustee, in 1868 Jones was elected, and in 1869 one Leavitt was elected, who declined to act, claiming exemption under the 15th section of the act, and in consequence thereof, at a special meeting on the 20th April, 1869, Davey, the other defendant, was elected trustee, and it further appears that they all acted as such and levied rates. It also appears that the necessary steps were taken in accordance with section 27, sub-sec. 11, for making a rate and levying the same. The warrant is in the usual form. We see nothing defective in it, nor in the levy under the warrant.

We therefore think the appeals should be allowed, and that the verdict be entered for the defendants in the Court below.

*Appeals allowed.*

### REGINA V. LEVECQUE.

32-33 Vic. ch. 28, D.—Form of conviction under—*Certiorari*—Practice.

A conviction under 32-33 Vic. ch. 28, D., for that V. L. was in the night time of the 24th February, 1870, a common prostitute, wandering in the public streets of the City of Ottawa, and not giving a satisfactory account of herself, contrary to this statute: *Held*, bad, for not shewing sufficiently that she was asked, before or at the time of being taken, to give an account of herself, and did not do so satisfactorily.

*Semble*, proceedings having been taken under 29-30 Vic. ch. 45, D., that the evidence might be looked at; and if so it was plainly insufficient, in not shewing that the place in which she was found was within the statute, or that she was a common prostitute.

The conviction having been brought up by *certiorari*, when, under the 32-33 Vic. ch. 31, D., no such writ could issue—Per *Richards*, C. J., and *Morrison*, C. J., it could not be quashed, but the Court could only discharge the defendant.—*Semble*, Per *Wilson*, J., that being before the Court it might be quashed.

*Harrison, Q. C.*, obtained a rule in Easter Term last, calling on the Police Magistrate of Ottawa, and John Jordan, the informant, to shew cause why the conviction of Victoria Levecque by the Police Magistrate on the information of John Jordan, should not be quashed, and the said Victoria Levecque altogether discharged from custody for or by reason of anything in the conviction or in the warrant issued thereon contained, on the ground that the conviction is not sufficient in form, and does not sufficiently state any offence within the jurisdiction of the magistrate, and does not state whether the imprisonment is with or without hard labour, and there was no evidence adduced before the magistrate to sustain the offence, if any, therein attempted to be stated; or why such other relief should not be granted.

The conviction, made on the 25th of February, 1870, stated that Victoria Levecque, on the oath of John Jordan, constable, was convicted, "for that she, the said Victoria Levecque, was in the night time of the 24th of February, 1870, a common prostitute wandering in the public streets of the said City of Ottawa, and not giving a satisfactory account of herself, contrary to the form of the statute in such case made and provided"; and that the magistrate adjudged her for her said offence to pay a fine of \$50, inclusive of costs, and also to be imprisoned in the common gaol of the county for the term of two months.

The evidence was as follows: "*John Jordan* sworn—Last night about nine o'clock the defendant was with a soldier in the barrack yard; he put her against the wall and took up her clothes; another soldier then struck me; she was drunk; she bears a very bad character; I heard she was a prostitute; I saw her drunk on the street before; I only speak of her character by reputation; I never saw her prostitute herself before; I have no doubt she was there for an improper purpose."

*M. C. Cameron, Q. C.*, shewed cause. The first enquiry is, in what way and by what proceedings the conviction and warrant and the evidence and other papers are before the Court. Is it by *habeas corpus* or by *certiorari*?

The conviction was made under the Dominion Act 32-33 Vic. ch. 28, and ch. 31 shews no appeal can be brought. If the proceedings are by *habeas corpus*, then the 29-30 Vic. ch. 45 applies. The motion to quash is based on the removal by *certiorari*, and if so, even though an appeal lies under the Dominion Act of last session, 33 Vic. ch. 27, not yet published, the proper proceedings have not been taken as to notice required in such a case: *Rex v. Perrott*, 2 T. R. 734; *Anonymous* 1 B. & Ad. 382. It is said the right to a *certiorari* is not taken away, though a statute deprives the party of it, if the magistrate has no jurisdiction over the offence, but that is not the case here. The recognizance given here is not, by the 3rd section of the Act of 29-30 Vic. ch. 45, conditioned to appear in court on a day certain in term, and so on from day to day, as the Court shall require, but to appear before the Court whenever notified to attend by a notice to be delivered to the Attorney of the applicant, if she have an attorney, or if she have no attorney, then by putting up the notice in the office of the Clerk of the Crown and Pleas, twenty-four hours before proceeding on the notice. The Court may look at the sufficiency of the materials if the proceedings are by *habeas corpus*, under the Act of 1866, but not at the sufficiency of the evidence if there is evidence: *Regina v. Munro*, 24 U. C. R. 44.

*Harrison*, Q. C., supported the rule. The party could have been bailed, though proceedings were not under the Act of 1866: *Re McKinnon*, 2 U. C. L. J. N. S. 324. The proceedings in this case originated before Mr. Justice Galt, in Chambers, who directed a *habeas corpus* and *certiorari* to issue, and he afterwards referred the matter to this Court, upon which a recognizance was entered into. However the conviction got here, it being here a motion may be made to quash it; the proceedings are here under the Act of 1866, and no notice was necessary by that Act previous to the application that was made under it, though a notice is required by the general law: *Regina v. Ellis*, 25 U. C. R. 324. The 71st section of the Dominion Act

32-33 Vic., which provided that no conviction, or order or adjudication made in appeal therefrom, shall be quashed for want of form, or be removed into any of Her Majesty's superior Courts of record, &c., has been repealed by the Act of 33 Vic. ch. 27, and re-enacted as follows: "No conviction or order affirmed, or affirmed and amended in appeal, shall be quashed," &c. Now this conviction had never been affirmed, and therefore it is appealable as heretofore. The 71st section as it stood in the 32-33 Vic. ch. 31, was the same as sec. 111 in the Imperial Act 24-25 Vic. ch. 96, and as sec. 69 in the 24-25 Vic. ch. 97; See also 9 Geo. IV. ch. 61, sec. 34. The Court can therefore judge of the sufficiency of the conviction. No offence is stated here, because it is not shewn she was a prostitute, and wandering in the public streets, and that she did not give a satisfactory account of herself. It should have been stated that she was in some street named, which was a public street, and being called on to give an account of herself, did not do so. The statement must be certain, so as to be an answer in the event of a second charge for the same offence. The evidence, moreover, does not shew that she was a common prostitute, or that she was a prostitute at all: *Rex v. Ferguson*, 3 O. S. 220; *Re Donnelly*, 20 C. P. 165; *The Queen v. Andrews*, 25 U. C. R. 196. [WILSON, J., suppose it were found that she was an inmate of a common house of ill-fame.] That might be sufficient, but it is not this case. The statute says the imprisonment shall be "with or without hard labour," in the discretion of the convicting magistrate, and this conviction does not say whether the imprisonment is to be with or without hard labour; it is therefore bad: *Re Slater*, 9 U. C. L. J. 21; *The King v. Hoseason*, 14 East 607; *Wood v. Fenwick*, 10 M. & W. 195.

WILSON, J., delivered the judgment of the Court.

The 71st section of the 32-33 Vic. ch. 31, as amended by the Act of last session, does not prevent the removal of the conviction by *certiorari*.

Here the matter is brought before us by *habeas corpus* and *certiorari* under the Act of 1866.

By sec. 3 of that Act, although the return to the writ is good and sufficient in law, the truth of the facts set forth in it may be examined into by affidavit.

And by sec. 5 a *certiorari* may be directed to issue, to have certified and returned "all and singular the evidence, depositions, convictions, and all proceedings had or taken touching or concerning such confinement or restraint of liberty, to the end that the same may be viewed and considered by such judge or court, and to the end that the sufficiency thereof to warrant such confinement or restraint may be determined by such judge or court."

Under these provisions the whole matter is before us, to judge and determine "of the sufficiency thereof to warrant such confinement or restraint."

We might still be obliged to consider the conviction as upon a *certiorari* issued at the common law, if we found the conviction in this Court, however brought here, so long as it was regularly here: *The Queen v. Hellier*, 17 Q. B. 229; *The Queen v. Hyde*, 16 Jur. 337.

The statute in question, 32-33 Vic., ch. 28, enacts that "all common prostitutes, or night-walkers wandering in the fields, public streets or highways, lanes or places of public meeting or gathering of people, not giving a satisfactory account of themselves, shall be deemed vagrants," &c.

This conviction is, that the applicant "was in the night time of the 24th of February, 1870, a common prostitute wandering in the public streets of the said city of Ottawa, and not giving a satisfactory account of herself, contrary to the statute," in the very language of the statute.

But it is said it should have been shewn she was asked to give an account of herself, and that she did not give a satisfactory account: that it is consistent with the conviction that, though a common prostitute, she was rightly or excusably wandering in the streets, as she had the right to do, in like manner and for the like purpose as any other person; and that, although a common prostitute, and

wandering in the public streets, she gave no account of herself simply because no one asked her to give it, and that she was under no necessity to give any account of herself until she was asked to do so.

No doubt a common prostitute wandering in the public streets should not be apprehended and taken to a lock-up without knowing what it is for. In the nature of things she should know, if she is taken up, what it is for. She is not to be taken at all, until she has failed to give a satisfactory account of herself.

If she is not asked what business she, a common prostitute, has wandering in the streets, or why it is she is there? she may not know whether she is taken up for murder or for robbery, or for what other offence, or whether she is taken up for an offence at all; and she cannot suppose she is taken up for wandering in the streets, though she is a common prostitute, so long as she is conducting herself harmlessly and decently, and just as other people are conducting themselves.

But the question is, is it or may it not be reasonably presumed that she was asked to give an account of herself, when the conviction alleges "she did not give a satisfactory account of herself"?

It appears to me the conviction should allege that the woman was asked before she was taken, or at the time of her being taken, to give an account of herself—that is, of her wandering in the public streets, she being a common prostitute or night-walker—and that she did not give a satisfactory account of herself.

In *Lawrence v. Hedger*, 3 Taunt. 14, the person taken up on suspicion of felony at 10 o'clock at night, was interrogated as to how he came by the property.

In *Rex v. Bootie*, 2 Burr. 864, in an indictment for allowing a night-walker to escape who was delivered to defendant for safe keeping, it was alleged the woman, at the time of her arrest, was "a loose, idle, lewd, and disorderly person, and a common street-walker, and being then and there behaving herself riotously, and walking the streets

there to pick up men, in breach of his Majesty's peace"—shewing plain misconduct and a very unsatisfactory account of herself.

In *The Queen v. Tooley et al.*, 11 Mod. 242, 248, Lord Holt said, "For certainly a suspicion barely conceived by the constable is not sufficient, without some act of lewdness done." Powell, J., said, "Whenever a constable may take up any person, it must be either for an actual breach of the peace or upon good grounds of suspicion, and the cause of his suspicion must be shewn, because it is traversable. \* \* Therefore, Gray having taken up this woman without any just cause of suspicion, she was illegally imprisoned."

At p. 248, the counsel for the prisoners, before the twelve judges, referred to *Hern's Pleader*, 488-9, where there is a precedent that the constable may arrest night-walkers, in which it is set forth, "that the plaintiff was wandering in the streets at twelve at night, and the defendant being on his watch *demanded of the plaintiff whither he was going, which he refused to answer*, and therefore he took the plaintiff." And so it was argued, in the principal case, that it ought to have appeared the woman was a night-walker, wandering about suspiciously at an unreasonable time of the night.

That was a charge of murder, for killing a person who aided the officer in taking the woman. The facts were, that between eight and nine at night the woman was in the street between the play-house and the Rose tavern. The constable suspected her to be a disorderly person, and took her into custody. The constable had before taken her up as a disorderly person, but she had not misbehaved herself in any way at the time of her being arrested.

And these facts shewing no cause for arresting her, the killing was held to be no murder, but manslaughter only. The case is also reported in 2 Ld. Raym. 1296, and Holt 485.

In the former of these reports, it is said by the Court, p. 1301: "The taking up of the woman was illegal, though she had been in the officer's custody before; and, if so, he

did not act as a constable, but a common oppressor. The verdict don't find that she was guilty of any disorderly act when he had her in his custody before; and it is not a constable's suspecting that will justify his taking up a person, but it must be just grounds of suspicion, for that is traversable : 2 Inst. 52."

The language is very much the same in Holt's report of the case.

We are therefore of opinion, that the conviction should shew a request made on the woman at the time of her arrest to give an account of herself, and that she did not give a satisfactory account, and that therefore the arrest was made. And we are also of opinion that the allegation, she giving no satisfactory account, does not shew that any prior demand or request had been made on her for that purpose.

There are many authorities collected in *Re Donelly*, 20 C. P. 165, which shew that describing the offence in the very words of the statute is not, in many cases, a sufficient statement to sustain a criminal charge.

This case is decided on the conviction alone. It is very likely, however, that the court may also be able to look at the evidence, when proceedings are taken under the Act of 1866, and to determine as to the sufficiency of it in warranting personal confinement or restraint.

The evidence, if looked at, is plainly insufficient. It does not shew that the *place* was in the street or highway, lanes, or places of public meeting or gathering of people. Its being in the barrack-yard may have been, for anything that is shewn, in the most deserted, unfrequented part of the city. Nor that the *person* was a *common* prostitute, nor that she was a prostitute at all. The witness speaks of her only by reputation.

No doubt the act she was committing when the constable saw her was improper, and might, under certain circumstances of place, justify her apprehension, though not a prostitute at all.

The case of *Re Jones*, 7 Ex. 586, is a clear authority as to the insufficiency of all this to sustain the charge.

The rule will be absolute to discharge the said Victoria Levecque altogether from custody, which is the most that can be done under the Act of 1866.

I think, as the conviction is in fact here, it may be moved against, and that the conviction may be quashed; but I express no positive opinion on the point. The Chief Justice and my brother Morrison think the conviction cannot be quashed, as at the time when the writ issued it could not, by the Act of 1869, have been issued under it; and that the proceedings are here merely for the purpose of determining on the legality of the restraint of liberty. The rule absolute stands for the discharge of Victoria Levecque from custody, and is now discharged as to the residue.

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### OLIVER QUI TAM V. HYMAN.

*Inspection of raw hides*—27-28 Vic. ch. 21; 29-30 Vic. ch. 24; 33 Vic. ch. 37.

The defendant bought hides, some of which had been produced within and some without the County of Middlesex, but all without the City of London. Some were purchased by him in and some out of the county, but none within the city; and they were brought by him into the city, placed in his tannery there, and manufactured into leather.

The plaintiff was an inspector of raw hides and leather, appointed under 27-28 Vic. ch. 21, 29-30 Vic. ch. 24, and 33 Vic. ch. 37, for the city and county, having a place of inspection within the city, but not elsewhere.

**Held**, 1. That his compulsory powers extended only to the city, but that his limits of inspection might extend to the area assigned to him as the district in which the city was situate, although his acting therein would be optional with him; and he might in his discretion go also into any part of the Province not within another inspector's limits.

2. That all raw hides or green raw hides produced within a city or town for which there is an inspector must be inspected before being sold there: that if produced and sold without such city or town they are exempt from inspection until brought within it; and the then purchaser must have them inspected before selling or disposing of them in any way whatever.

3. That the tanning or using the hides in his own business was not a "disposing of them in any way whatever," within the statute, 29-30 Vic. ch. 24, sec. 1. *Wilson, J.*, dissenting.

The defendant therefore was held not liable to the penalty for not having these hides inspected.

THIS action was brought by the plaintiff, suing as well on his own behalf as on behalf of the Corporation of the City of London, to recover from the defendant the sum of \$320, being the amount of four penalties of \$80 each, provided by sec. 8 of 29-30 Vic. ch. 24, under the circumstances hereinafter mentioned; and by the consent of the parties, and by order of the Honorable Mr. Justice Adam Wilson, the following case was stated for the opinion of the Court, without pleadings.

CASE.

The plaintiff was and is inspector of raw hides and leather duly commissioned under 27-28 Vic. ch. 21, and 29-30 Vic. ch. 24, and 33 Vic. ch. 37, for the City of London and for the County of Middlesex, but the said inspector had not at the commencement of this action any established place for the inspection of hides in the said County of Middlesex, except in the said City of London; and while the plaintiff was such Inspector, and on the 12th, 28th, 29th and 31st days of March last, the defendant, who is a tanner and manufacturer of leather in the City of London, purchased and had delivered at his place of business in the City of London, on each of such days, one load of hides composed partly of green raw hides, green cured hides, untanned dry hides, cured, salted and dry hides; and that the whole or part of each kind of said hides were over twenty pounds avoirdupois each.

It is admitted that all the said hides were produced without the City of London, some of them being produced in the County of Middlesex, within the limits of which the plaintiff is inspector as aforesaid: that they were all purchased by or on behalf of the defendant as aforesaid; and that some of each kind of hides, that is to say, green raw hides, green cured hides, untanned dry hides, cured salted and dry hides, were produced without the County of Middlesex and the plaintiff's limits as inspector as aforesaid; some of each kind of hides as aforesaid produced within the said County of Middlesex and the plaintiff's limits as

inspector, were purchased within the County of Middlesex, and some without the County of Middlesex, and that all the said hides were purchased without the City of London, and were never inspected before or after coming into the said city, and after being so purchased were brought within the limits of the City of London by the defendant, and were duly placed in his tannery in the City of London, and are now manufactured or in course of manufacture into leather in the said tannery; it being admitted that the said hides were some of each kind as aforesaid bought without the said City of London, some without the County of Middlesex, and some within the said County, and brought within the said city, as before stated, for the purpose aforesaid.

It is admitted that the plaintiff demanded to inspect the hides in question, which was refused by the defendant on the grounds that they were not, nor was any of them liable to inspection.

The questions for the opinion of the Court are :

1. Whether the plaintiff not having a proper place established for the inspection of hides under the said acts, within the said county, except in the said City of London, is entitled to inspect hides produced either within or without the said county, and purchased within the said county outside of the said City of London.

2. Whether green raw hides, green cured hides, untanned dry hides, cured, salted and dry hides, or either of them, produced and purchased without the inspector's limits, for manufacturing purposes within the inspector's limits, are liable to inspection.

3. Whether green raw hides, green cured hides, untanned dry hides, cured, salted and dry hides, or either of them, produced without the inspector's limits, and purchased within such limits for the purpose of being manufactured into leather within the said limits, are liable to inspection.

4. Whether green raw hides, green cured hides, untanned dry hides, cured, salted and dry hides, or either of them, produced and purchased within the inspector's limits, but

without the City of London, for the purpose of being manufactured into leather, are liable to inspection.

5. And whether green raw hides, green cured hides, untanned dry hides, cured, salted and dry hides, or either of them, produced without the said County of Middlesex, and brought within the said City of London, and there purchased for the purpose of being manufactured into leather, are liable to inspection.

6. Whether green raw hides, green cured hides, untanned dry hides, cured, salted and dry hides, or either of them, produced within the said County of Middlesex, out of the said City of London, and purchased within the said city by the defendant for the purpose aforesaid, are liable to inspection under the said Acts of Parliament.

7. Whether all or any of the said hides, while in the defendant's hands under the circumstances and for the purposes aforesaid, are liable to inspection.

It is agreed that if the Court decide favorably to the plaintiff the verdict herein will be for 1s. damages, and if the Court shall be of the opinion in the negative, then judgment to be entered for the defendant; and it is further agreed that each party shall pay his own costs of this suit.

In this term the case was argued :

*Glass*, for the plaintiff. The 27-28 Vic., ch. 21, sec. 4, shews the area for which the inspector may be appointed; and sec. 13 shews that he must have a convenient situation for the purpose of having his inspections. The fine is imposed by 29-30 Vic., ch. 24, sec. 8; and the Dominion Act, 33 Vic, ch. 37, sec. 1, requires inspectors to keep books containing an entry of all their inspections, and makes said books open to public search. These provisions shew that the inspection is compulsory upon all those who deal in hides. The moment the hides were brought within the city of London by defendant, wherever produced and wherever purchased, for the purpose of being used by him in his business of tanner and manufacturer of leather in London, they became liable to

inspection. There may be difficulties in giving effect to the provisions of the statutes in some cases, but that will not prevent their being operative, however inconvenient it may be to persons dealing in such articles. The defendant cannot complain of inconvenience so far as he is concerned.

*C. S. Patterson*, contra. The object of the statutes was to protect purchasers as to the weight and quality of hides they were buying. The only compulsory clause to have hides inspected is the 29-30 Vic., ch. 24. sec. 1, and that applies merely to *raw* hides. *Disposing* of hides cannot mean more than the other expression, *selling*, or, perhaps, exchanging; it cannot prevent the party himself from using the article in and for his own purposes. The only *disposal* made by defendant of the hides is by putting them into his tannery and tanning them. The compulsory clause, too, applies only cities, and not where hides are bought and sold in the country, and merely taken into the city after purchase. The Consol. Stat. C., ch. 51, refers to the inspection of sole leather.

*Glass*, in reply. *Disposing* of the hides is effected by tanning them. The plaintiff's limits are not clearly defined by assigning to him the city of London and the *District* in which it is situate, under 27-28 Vic., ch. 24, sec. 4. The case shews an appointment of the plaintiff to the city of London and the county of Middlesex.

WILSON, J., delivered the judgment of the Court.

1. The facts are, that all the hides composed of (a) green raw hides, (b) green cured hides, (c) untanned dry hides, (d) cured, salted and dry hides, were produced without the city of London.

2. Some of them were produced in the county of Middlesex; and

3. Some without it.

4. The defendant bought all the said hides without the city of London.

5. Some of them within the county of Middlesex; and

6. Some of them beyond it.

7. The defendant brought the hides into London after buying them, and placed them in his tannery there, for the purpose of manufacturing them into leather; the same being now in the process of being so manufactured.

8. The hides were never inspected by any authorized inspector under the statutes, either before or after they were brought into London.

9. The plaintiff had an established place for the inspection of hides in London, during all the time the hides were brought into the city by defendant.

10. The plaintiff demanded of the defendant in London, after the hides were brought there, (as I assume the facts to be), to be allowed, by virtue of his office as inspector, to inspect them, but the defendant refused to allow the inspection, on the ground that they were not, nor were any of them, liable to be inspected.

The legislature having provided, by the Consol. Stat. C., ch. 51, for the inspection and branding of sole leather in incorporated cities and towns, though it was not compulsory on any one to have it inspected, made provision by the 27-28 Vic., ch. 21, for the inspection of raw hides and leather, but did not make such inspection obligatory either:

The 29-30 Vic., ch. 24, made the inspection of *green raw hides* compulsory in regard to *cities and towns*.

I must, therefore, analyze the enactments as shortly as I can.

By the Act of 1864, sec. 4, the Governor in Council, at the request of any ten persons trading in raw hides or in leather, or engaged in the manufacture or in the working up of leather, may appoint in each city, (in which there is a Board of Trade, sec. 1), an inspector of raw hides and leather for such city and the district in which such city is situate.

These latter words, as to the *district*, create a difficulty as to the area beyond the city which may be comprised within the jurisdiction of the inspector. Here the plaintiff is inspector for the city of London, and also for the whole

county of Middlesex. That appears to me to be too large a district for compulsory inspection.

By sec. 13 of the Act of 1864, taken from the Consol. Stat. C., ch. 51, sec. 8, (the whole of which Act restricts the limits of the inspector to the city or town), the inspector must have a store or warehouse "in the city or town for which he is appointed," to make his inspections. And by sec. 25, the brand or mark is to have the initials "of the city or town where inspection is made." By the Act of 1866, sec. 1, the inspector's limits are spoken of as "any city or town." And by the Act of 1870, sec. 2, the inspector is to make a return to the Board of Trade "of the city or town in respect to which he has been appointed." Sec. 3 uses similar language; and by sec. 5, penalties are to be recovered before the Recorder or Police Magistrate "of the city or town within the inspection limits of the said inspectors."

From these extracts it is impossible to say with precision what can properly be called, under these Acts, "the district in which such city is situate." But considering the provisions before mentioned, and considering also the contention made, that no green raw hides, above twenty pounds, produced *within the limits* of the inspector, can be sold or offered for sale in the city or town within his limits until inspected; and that those produced *without his limits* may be sold, (though not a second time, it is said,) until inspected, (Act of 1866, sec. 1,) it is important, if possible, to know what place can be said to be within and what without his limits, and to what extent, and in what manner, his powers may be exercised therein.

The 34th section of the Act of 1864 may give some assistance in determining it. It provides that, "In the event of the inspector for the city of Québec, or for the city of Montreal, being required, in writing, to inspect any raw hides or skins for persons residing beyond the limits of the place for which the said inspector has been appointed, such inspector may, if he thinks fit, proceed to the inspection of such raw hides or skins, provided it be not within

the limits assigned to any other inspector, and that it be within Lower Canada; and in such case he shall make use of the said stamps or marks, and his duties and responsibilities shall be the same as though the inspection had taken place within the city of Québec or of Montreal. And the inspectors in Upper Canada shall have the same privileges, if they think proper to exercise them, in any part of Upper Canada not included within the limits assigned to any other inspector."

If by this section the inspector "for the city" of London may, at any place in Upper Canada, inspect "beyond the limits of the place for which he has been appointed," if not within the limits of another inspector, and if his inspection is to be by the same stamps or marks, and to be otherwise as though the inspection had taken place "within the city of London," it appears to me to be in general accordance with the other enactments before referred to, and to lead to the like conclusion to which they point, that the inspector is the officer of the city or town with imperative and compulsory powers therein: that his limits of inspection may extend to the area assigned to him, as the *district* in which the city or town is situate, within which no other inspector can act, and into which he cannot himself be compelled to go, although into it, as well as into any other place in Ontario which is not within the limits of another inspector, he may go if he thinks fit.

And I think that conclusion is fortified by the 27th section of the Act of 1864, which requires, under a penalty in case of refusal, that every inspector, on application made to him, personally or by writing left at his dwelling house, &c., on any lawful day between sunrise and sunset, by the owner or possessor of raw hides or leather, forthwith or within two hours thereafter shall proceed to such inspection, if not engaged at the time in inspecting elsewhere.

Now this could not possibly have been intended to make the inspector, whose district beyond the city or town extended to the boundaries of the county, start off on a two hours' notice, which might be given half an hour before

sunset, to the furthest limits of the county, to inspect a hide, for which he was only to get a few cents, under the penalty of \$20 if he refused to go.

The place of inspection also is, by sec. 13, at the store or warehouse of the inspector in the city or town, or at the store or warehouse of the owner, indicating also in the city or town. It certainly does not suggest a barn or stable where the hide might be on the confines of the county.

I cannot say this opinion is altogether satisfactory to myself, but I cannot see how any other more satisfactory can be formed.

I shall now proceed to consider the other enactments, under the construction I have placed upon the inspector's limits and jurisdiction.

Sec. 12 of the Act of 1864 provides that the inspector may examine and inspect any raw hides or leather on application to him by the proprietor or possessor, and ascertain the respective weights, qualities, and condition thereof.

Sec. 13. "Such inspection shall be made either at the store or warehouse of such inspector, which he is hereby required to keep in a convenient situation for that purpose, in the city or town for which he is appointed inspector, or, if he thinks fit, at the store or warehouse of the owner thereof."

Sec. 14. The inspector shall have power to make deductions from the weights of hides on account of dirt or of damage from cuts, and also additions thereto on account of loss by drying, as he may see fit.

Sec. 21. The inspector shall brand, stamp, or mark, immediately after inspection, the hides and leather.

By the Act of 1866, sec. 1, no green raw hide weighing more than twenty pounds, produced within the limits of the inspectors of leather and raw hides for any city or town for which an inspector of leather is now or may hereafter be appointed, shall be offered for sale or sold within the city or town, unless it shall have previously been inspected in accordance with the law. This provision

shall not apply to green raw hides produced without the inspection limits of the inspectors, but every purchaser of such hides shall cause them to be inspected after he shall have purchased or acquired them, and before selling or disposing of them in any way whatsoever.

Sec. 2. The inspector shall mark or stamp on each hide the net weight of it, and he shall inspect without the horns, &c.

Sec. 3. The inspector shall subtract from the weight of each rawhide all dirt and parts injured by knife cuts, and any other thing which ought not to be computed in the weight of the hides; and may add to such weight all that such hides may have lost by drying; the whole at his discretion; he shall also classify them as number one, two, or damaged, as the case may be.

By the Act of 1870, sec. 1, every inspector of raw hides and leather shall keep a proper book or books open to public inspection, in which he shall enter a statement or account of all green, raw, and salted hides and leather inspected by him or his assistant inspector or inspectors, shewing the respective weight, quality, and condition thereof, how the same have been classified by him, for whom they have been inspected, and the amount paid for such inspection.

Sec. 3. Every inspector of raw hides and leather shall give security for the performance of his duties.

These are all the enactments relating to the subject.

By the Act of 1864, no inspection was compulsory of any raw hide or leather: sec. 35.

By the Act of 1866, sec. 7, the 35th section referred to was repealed, "in regard to the cities and towns herein referred to, as respects such green raw hides."

The cities and towns herein referred to are those mentioned in sec. 1 of the Act of 1866, above quoted, "for which an inspector of leather is now or may hereafter be appointed," so that it applies to the city of London.

The Act of 1864 mentions throughout *raw hides* without making any distinction between the different kinds of them.

It would seem, under that general name, to include what are generally called green hides or green raw hides ; for by sec. 14, above cited, the inspector is to make deduction from the weight for dirt, or for damage from cuts, and to make additions on account of loss by drying, as in his discretion he may see fit ; and by sec. 15 he is to weigh and inspect without the horns, hoofs, or snout.

It is therefore evident that, in allowing for the loss by drying, the inspector had to judge how much more than the present weight the hide in its green state would probably have weighed ; it was the green hide which was the standard weight and article. Now these are the provisions repeated substantially in secs. 2 and 3, of the Act of 1866, above quoted ; and that Act is the one which first speaks of green raw hides.

By the repeal of the 35th section of the Act of 1864, *green raw hides* are, by sec. 7 of the Act of 1866, now within the provisions of the Act of 1864, with the non-compulsory clause repealed.

When, therefore, the Act of 1866 legislated respecting raw hides, by the designation of *green raw hides*, it made no substantial difference upon, or as to the article dealt with from what the Act of 1864 had done.

The meaning of the 1st section of the Act of 1866, according to my reading of it, in connection with the other enactments, is this :—that green raw hides, or raw hides, having relation to their green state as the standard, produced, that is taken off the animal, within the city or town for which there is an inspector, shall not be offered for sale or sold in the city or town unless they have been previously inspected in accordance with the law :

That green raw hides, explained as aforesaid, produced without the inspection limits of the inspector, that is, beyond the city or town for which the inspector is appointed, may be offered for sale or sold without inspection ; but the purchaser shall cause them to be inspected before selling them or disposing of them in any way whatsoever—that is, the purchaser who buys within the city or town for which

there is an inspector, or without such city or town, and brings his purchase within it, shall cause the same to be inspected, not at any particular time, but before selling the hides or disposing of them in any way whatsoever.

This reading of the Act does not compel an inspection of hides produced beyond a city or town and sold or disposed of beyond it. But for the reasons before given, I do not see how it is to be helped. The provisions have not been well considered, and perhaps some difficulty has been occasioned by dovetailing into a voluntary clause a compulsory enactment.

The Act, however, applies, I think, to all raw hides produced without the inspection limits; that is, in any place whatever, whether within or without the limits of the province, and brought within a city or town where there is an inspector.

And I think it applies also to all purchases so brought within the city or town, so that the purchaser must have the hides inspected before he sells them or disposes of them in any manner whatsoever; that is, before he tans them or parts with them, or uses them. I can place no other meaning on the words, "and before disposing of them *in any way whatsoever*." A forfeiture of all inheritances for treason does not forfeit an estate tail; but a forfeiture of *all manner* of inheritances does: *Jenkins* cent. 7, p. 287, case 21. So here, *disposing* of hides is not an inflexible, technical, or positive term. It *may* mean selling, bartering, or exchanging. But disposing of hides, "in any way whatsoever," means, to my apprehension, much more than bartering or exchanging them. That is, no doubt, one way of disposing of them; but it is not the only way, or every way, or any way whatsoever, in which hides may be disposed of.

It may be said, and with much reason, that there is no use in marking hides when they are the next moment to be turned into the tan vat. I confess I see no other reason myself for doing so, excepting that the officer will have his fees if they are marked and he will lose them if they are not marked, and excepting that the record of the

hides for statistical purposes, which is required to be kept, will be prevented from being made under the last statute. I see no other way of construing the enactment.

I proceed now to answer the questions submitted, according to my construction of the statute.

1. The plaintiff is not and was not entitled to inspect hides produced without the county of Middlesex, or within the county but outside of the city of London, whether purchased within or without the county, or within or without the city, so long as the hides were not brought within the city by the purchaser. If brought within the city by the purchaser, the inspector is entitled to inspect before the purchaser sells or disposes of the hides in any manner whatsoever.

The fact that the plaintiff had no other place of inspection than in the city makes, in my opinion, no difference in the case.

2. *Any raw hides*, by the Act of 1864, sec. 12, including green raw hides, as before explained, and every other kind of hide which is properly a *raw hide* or *green raw hide*, produced and purchased without the inspector's limits, for manufacturing purposes within the inspector's limits, are liable to inspection, when brought within the city or town for which he is inspector, before the purchaser sells or otherwise disposes of them in any manner whatsoever, as by manufacturing the hides into leather.

But whether green cured hides, untanned dry hides, cured, salted and dry hides, are, or any and which of them are, raw hides or green raw hides, I cannot tell. That is a matter of fact wholly. I shall therefore take no more notice of these different kinds of hides, but call the hides to which I refer raw hides.

3. Raw hides produced without the Inspector's limits, and purchased within such limits, for the purpose of being manufactured into leather within the said limits, taking the place of purchase and of manufacture or of manufacture to be in the City of London, are liable to be inspected

before they are sold, or before they are disposed of in any manner whatsoever, as by manufacture into leather.

4. Raw hides produced and purchased within the Inspector's limits, but without the City of London, for the purpose of being manufactured into leather, are not liable to inspection till brought within the City of London, and then they must be inspected before sold or disposed of in any manner whatsoever.

5. Raw hides produced without the County of Middlesex and brought within the City of London, and there purchased for the purpose of being manufactured into leather, are liable to inspection before the purchaser sells or disposes of them in any manner whatsoever, as by manufacturing them into leather.

6. Raw hides produced within the County of Middlesex out of the City of London, and purchased within the city by the defendant for the purpose aforesaid, are liable to inspection before he sells or disposes of them in any manner whatsoever, as by manufacturing them into leather.

The seventh question is already fully answered.

The Chief Justice and my brother Morrison do not agree in the answers I have given to the second, third, fifth, and sixth questions.

They are of opinion that manufacturing of hides into leather is not a "disposing" of them, within the meaning of the statute: that the expression is synonymous with *selling*, and refers to a trafficking in or with hides by barter or exchange, and not to a conversion of them by tanning into leather, or to the using of them by the purchaser in and about his own business, or for his own purposes, in any manner he may see fit.

And they agree in the answers as I have given them to the first and fourth questions, with the like reservation.

The rule will therefore be, on the consent of parties, that judgment be entered for the defendant, without costs, each party having agreed to pay his own costs whatever the result of the suit might be.

*Judgment for defendant.*

## J. L. SQUIRE V. MOONEY.

*Taxes—Distress—Trespass.*

One N. S., the plaintiff's son, was assessed in 1868 as a freeholder, for \$450 on real estate and \$200 on personal property, and was on the collector's roll for county rate \$9 75, school \$7 02, township rate \$2 60, and dog tax \$2—in all \$21 37. The rate did not appear on the collector's roll, and the collector was not aware how much was for real and how much for personal property. He demanded the taxes from the plaintiff, to whom N. S. had made an assignment in August 1868, and the plaintiff offered to pay him the tax on the real estate only, but he tendered no money and required a receipt in full for the real property. The defendant thereupon seized on the premises goods which had belonged to N. S., and the plaintiff brought trespass.

*Held*, that he could not recover, for it was not shewn, and the Court would not assume, that any part of the amount seized for was for personal property except the \$2 dog tax; and this sum being severable, and the other sums not tendered, his seizing for it with the rest would vitiate the whole distress.

*Held*, also that a demand upon the plaintiff was sufficient.

TRESPASS to goods.

Plea, not guilty, by statute, Consol. Stat. U. C. ch. 126, &c.

The case was tried at Goderich at the Fall assizes for 1869, before Hagarty, C. J., C. P., without a jury. It appeared on the trial that Nathaniel Squire, a son of the plaintiff, was assessed on the assessment roll for 1868, for the township of Morris, for \$450 real estate, and \$200 personal property, in all \$650, and on the collector's roll he was down for county rate, \$9.75, school \$7.02, township rate \$2.60, and dog tax \$2—in all \$21.37. The rate was struck in August, but it did not appear on the roll, and the roll was given to the collector on the 1st of October. He was assessed as freeholder, not as non-resident.

The defendant was the collector. He saw the plaintiff in November, and asked him would he pay the taxes; the plaintiff said he would see him again at another time. On that occasion the defendant had the roll with him. The taxes not being paid the defendant seized a buggy and harness on the premises, the property of one Sloan, then living there as the plaintiff's tenant. It appeared also that the goods seized had been Nathaniel Squire's, who got into difficulty, and assigned them with other pro-

perty to the plaintiff on the 31st August, 1868, and left the country. It appeared also that Sloan, for the plaintiff, told the defendant he would pay him the tax on the real estate but not on the personal. Sloan mentioned \$16 or \$17, but no money was actually tendered; defendant said he would consider it tendered, and he would take the amount, but would not give a receipt in full. Sloan would not pay without he got a receipt in full for the real property, which the defendant would not give. The witness said that the defendant did not know how much was for real or for personal property; the defendant seized the goods on the premises on the 27th November, 1868, and sold them after the usual notice, a copy of which was put in.

At the trial the plaintiff contended that he was not liable for the taxes on Nathaniel's personal property, but he did not shew what amount, if any, was for taxes on personal property, except the dog tax. The defendant's counsel contended that trespass would not lie if any taxes were due.

The learned Chief Justice was of opinion that a demand was made, and that the plaintiff could not recover; and he found a verdict for defendant, reserving leave to the plaintiff to move to enter a verdict for \$35, if the Court should think, on the whole evidence and finding, that he was entitled to recover.

In Michaelmas Term following, *Harrison*, Q. C., obtained a rule *nisi* accordingly, the grounds taken in the rule being that defendant had no right to distrain the plaintiff's goods for Nathaniel's personal property or dog tax, and there being no distinct sum shewn to be due in respect of the real property tax the distress was illegal: that there was a sufficient tender of the real property tax, if severable, before distress, which tender being refused the distress was illegal; and that there was no demand of the taxes before the distress, and so it was illegal. The rule also asked for a new trial on the ground of misdirection for the reasons mentioned, and that the verdict was contrary to law and evidence.

*C. Robinson, Q. C.*, shewed cause. Trespass will not lie, for the distress was not wholly illegal. The amount due upon the real property was certainly payable by the plaintiff. The collector could not tell, and the plaintiff at the trial did not prove, how much of the whole \$21.37 was for personal property. The \$2 for dog tax no doubt was, but that being a separate sum was severable, and the plaintiff should have tendered the rest: *Corbett v. Johnston*, 11 C. P. 322; *Skingley v. Surridge*, 11 M. & W. 515-516. The tender was clearly bad, because a receipt in full for the real estate was required. The demand on the plaintiff was sufficient: *Anglin v. Minis*, 18 C. P. 170; 29-30 Vic., ch. 53, secs. 10, 21, 26, 51, 91, 95, 97, 103.

*Harrison, Q. C.*, contra. Taking the assessor's and collector's rolls together, it is plain that nearly half of the whole sum was for taxes on Nathaniel Squire's personal property, for which the plaintiff was not liable; and the sums are not severable. The distress was therefore bad *in toto*, and trespass lies: *Sibbald v. Roderick*, 11 A. & E. 38; *Milward v. Caffin*, 2 W. Bl. 1330; *Clark v. Woods*, 2 Ex. 395. If the sums can be considered severable there was a tender of enough to cover the realty: *Douglas v. Patrick*, 3 T. R. 684; *Ryder v. Lord Townsend*, 7 D. & R. 119; *Bamford v. Clewes*, L. R. 3 Q. B. 729. There was no proper demand. Sec. 95 says that the collector shall call on the person taxed, and shall demand payment of the taxes payable by such person. "Taxed," means taxed upon the roll, which the plaintiff was not: *Anglin v. Minis*, 18 C. P. 170.

MORRISON, J.—The first difficulty that presents itself in this case is, to ascertain for what taxes or for what amount did the defendant distrain. From the evidence it is certainly far from clear. All that we learn from the notes of the trial is, that Nathaniel, a son of the plaintiff, was assessed as a freeholder for a lot of land, of which at the time of the alleged trespass the plaintiff was then the subsequent owner: that goods which formerly belonged to Nathaniel, but had been assigned to the plaintiff, were seized on the premises in ques-

tion and sold, as appears by the notice of sale, for the taxes charged against the lot in Nathaniel's name. The amount of the taxes for which the goods were seized does not in fact appear, but assuming it to be for the sum of \$21.37, appearing on the roll, what portion of that amount, if any, except the dog tax, was for personal property of Nathaniel, is not stated. The assessment roll shewed that he (Nathaniel) had been assessed for \$450 for real estate, and \$200 for personalty, but what the taxes appearing on the defendant's roll were charged for does not appear. The amount of the several sums is \$21.37, of which \$2 is the dog tax, leaving \$19.37. The plaintiff assumed the amount he was liable to pay was about \$17, shewing only \$2 or \$3 in dispute.

The only point insisted on at the trial by the plaintiff was, that he was not liable to pay the taxes charged against his son's personal property ; but it does not appear that he took the trouble at the trial to bring under the notice of the learned Chief Justice how much, if any, of the amount for which the defendant seized was a charge on account of Nathaniel's personal property except the dog tax of \$2. I do not think that we are bound to assume or conjecture that any part of the amount seized for was for other than real estate except the \$2 rated separately on the roll, and the only question arising on the first objection taken in the rule is whether trespass will lie for seizing and levying for the whole \$21.37, including the \$2.

In all the English authorities where questions as to the legality of seizure for rates arise, a special warrant signed by Justices appears to have been issued, and it is decided in such cases that where rates that are chargeable are joined in the same warrant with others not recoverable, and the amounts of which are blended in one sum, the warrant is not sustainable for any part. But in the case of this defendant he requires no warrant other than his roll, and the authority and direction of the statute, after a demand and refusal, to distrain for the taxes entered on his roll ; and here, assuming that the sums of \$9.75, \$7.02, and \$2.60 were chargeable on the lot in question against

the former occupant, Nathaniel, there can be no doubt that the defendant had a right to seize and distrain for these amounts. If he distrained for the \$2 dog tax, which it does not appear clear that he did, and that he was not authorized to do so on the goods of this plaintiff, this sum is clearly severable from the other taxes. The roll is the defendant's warrant to seize for the other sums against the subsequent owner, this plaintiff, as well as a warrant to seize on the goods of the former occupant, Nathaniel, for the dog tax.

As said by Draper, C. J., in *Corbett v. Johnston*, 11 C. P. 322. "If he distrained at the same time for other sums not authorized by law, no case goes the length of deciding that the distress would have been invalid \* \* The plaintiff, if he desired to relieve his goods, must have paid or tendered the three sums, and then he might have resisted payment of the residue and replevied his goods. \* \* His distraining without authority for other sums cannot vitiate the whole distress founded on the tax rolls."

The defendant as collector had a right to seize, and doing so he is not a trespasser (although his subsequent conduct in selling for too much, if such was the case, might render him liable in some other form of action) unless the plaintiff tendered the amount really due. And see *Anglin v. Minis*, 18 C. P. 170.

The second ground in the rule is that a tender was made; but on reading the evidence no specific amount was tendered or agreed upon, and it further appears that the defendant was willing to take the amount offered, but would not give a receipt in full for taxes on the real estate, which the plaintiff's agent required before he would pay the money. We have had this term to consider the subject of a tender with a demand for a receipt, and it is quite clear that such a tender as made here is not good (a).

Then as to the third objection, it was not contended that the plaintiff was not the person who ought to pay the taxes on the lot in question, as he became the subsequent owner during the then current year, but the objection is that

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(a) See *Lockridge v. Lacey*, ante p. 494.

there was no demand of the taxes before the distress. The learned Chief Justice found that there was a demand on the plaintiff, and we think he was warranted in arriving at that conclusion. The only question is whether a demand on the plaintiff was sufficient. The case of *Anglin v. Minis* decided that no demand was necessary to be made on the plaintiff if a demand was made upon Nathaniel. Here the demand was upon the plaintiff, and it does not appear whether any was made on Nathaniel. The 97th section of the Assessment Act enacts, that "in case any person neglects to pay his taxes for ten days after such demand as aforesaid, the collector may levy the same with costs by distress of the goods, &c., of the person who ought to pay the same." &c. Now this plaintiff being the person who ought to pay the same, a demand made upon him I think quite sufficient to justify the collector, upon his refusing or neglecting to pay his taxes, to levy the amount of his goods, &c.

Much of the difficulty which has arisen between these parties is provided against by the amendment introduced into the Assessment Act of Ontario, 32 Vic. ch. 36, the 95th section of which authorises the collector to levy taxes neglected to be paid of any goods and chattels found on the premises, the property of or in the possession of any other occupant of the premises.

On the whole, I am of opinion that the rule should be discharged.

WILSON, J., concurred.

RICHARDS, C. J., not having been present during the argument, took no part in the judgment.

*Rule discharged.*

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DEVLIN V. THE GRAND TRUNK RAILWAY COMPANY OF  
CANADA.

*Contract to carry—Special conditions—Pleading.*

Declaration upon a contract by defendants to carry goods from St. Mary's to Hamilton within a reasonable time, alleging non-performance.

*Plea*, that the goods were carried upon certain special conditions, providing, in substance, that goods addressed to points beyond defendants' railway would be forwarded by public carriers, and defendants' responsibility should cease on notice to such carriers that the goods were ready for them; and that defendants should not be responsible for any damage or detention after said notice, or beyond their limits, nor for "claims arising from delay or detention of any train, whether in starting, or at any station, or in the course of the journey." And the defendants alleged that they had no station at Hamilton, and that they conveyed the goods to their nearest station thereto, and handed them over to the Great Western Railway Company, which conveyed them to Hamilton.

*Replication*, that the plaintiff sues not only for the neglect and delay in the plea alleged, but for unreasonable delay by defendants at St. Mary's, and for neglect to carry from thence to their station nearest to Hamilton.

*Rejoinder*, repeating the conditions set out in the plea, and alleging that defendants only agreed to carry on those conditions.

*Held*, on demurrer, that the rejoinder was bad, for not stating any facts to bring defendants within the conditions; and that the plea was bad for not averring that defendants conveyed the goods to their nearest station to Hamilton, and gave notice to the Great Western Railway Company, within a reasonable time.

DECLARATION on a contract by defendants to carry certain goods for the plaintiff from St. Mary's to Hamilton, and there deliver the same for the plaintiff within a reasonable time, subject to certain conditions endorsed on a receipt given by them. *Averment*, that all conditions endorsed on said receipt, and all other conditions, were performed, &c., necessary to entitle the plaintiff to have the said goods carried and delivered as aforesaid; yet the defendants did not carry and deliver the said goods for the plaintiff as aforesaid, within a reasonable time in that behalf, whereby, &c.

*Plea*, that the said goods were delivered by the plaintiff to the defendants, and were received by them to be carried upon a special contract with the plaintiff, in which it was provided, amongst other things, that the freight on said goods should be paid on delivery thereof: that all goods addressed to consignees at points beyond the places at

which the Company, the defendants, have stations, and respecting which no directions to the contrary shall have been received at these stations, will be forwarded to their destination by public carriers, or otherwise, as opportunity may offer, without any claim for delay against the defendants for want of opportunity to forward them; or they will, at the discretion of the Company, the defendants, by whom they may have been received, be suffered to remain on the Company's premises, or placed in shed or warehouse, if there be convenience to receive the same, pending communication with the consignees, at the risk of the owners for any damage arising from any cause whatever; but that the delivery of the goods by the Company, the defendants, shall be considered complete, and the responsibility of the Company, the defendants, will be considered to have ceased, when said carriers shall have received notice that the Company is prepared to deliver to them the goods for further conveyance. And it is expressly agreed that the Company shall not be responsible for any damage or detention that may happen to goods so sent by them, if such loss, damage, or detention, occur after the said notice, or beyond their limits: that the Company will not, under any circumstances, be liable for the loss of market, or claims arising from delay or detention of any train, whether in starting, or at any station, or in the course of the journey. The Company do not undertake to send goods by any particular train, if there be an insufficient number of cars at the station, or that cars cannot be conveniently used for that purpose, or if from any cause cars loaded at a station are unable to sent on by the train passing or starting from said station. And the defendants say that the above were some of the conditions of the special contract on which the defendants received the said goods, and upon which the plaintiff delivered the same to them, the defendants, and that the word Company, above contained, meant and was intended to mean the defendants, and that they, the defendants, did not agree in respect

to the delivery of the said goods otherwise than as above stated: that the said goods were consigned as in the declaration mentioned from St. Mary's to the City of Hamilton: that the defendants have and then had no station at Hamilton, and that on their line of railway Paris or Toronto are the stations nearest to Hamilton: that they, the defendants, conveyed the said goods from St. Mary's to their station most convenient to Hamilton, and then gave notice to the Great Western Railway Company that they were ready to deliver them the said goods for further conveyance, they having had from the plaintiff no other direction as to the transit of said goods: that in the course of business the said the Great Western Railway Company took and carried the said goods to Hamilton aforesaid, and on their arrival the plaintiff had notice that the said Company were ready and willing to deliver said goods to the plaintiff: that the plaintiff did not accept or take said goods, nor has he paid for or tendered the freight for the carriage thereof, on payment whereof they were alone bound to deliver the same.

*Replication*, that the plaintiff sues not only for the neglect and delay in said plea alleged, but for a long and unreasonable delay by the defendants of the said goods at St. Mary's, a station on their line of railway, and for neglect to carry said goods from St. Mary's aforesaid to Paris or Toronto stations on their said line of railway *en route* for Hamilton, the point in said plea mentioned, beyond the limits of their said railway.

*Rejoinder*, that the defendants received the goods upon a special contract with the plaintiff in which it was provided, amongst other things, &c., (repeating the conditions as set out in the plea.)

*Demurrer*, that the said rejoinder excuses only delay at the end of the transit of the said goods on their said line.

2. The said rejoinder admits the delay at St. Mary's, and in no way excuses or answers the same.

3. That said rejoinder admits the plaintiff's replication without sufficiently avoiding the same.

*Harrison*, Q. C., for the demurrer. The form of declaration is the same as in *La Pointe v. The Grand Trunk R. W. Co.*, 26 U. C. R. 479. The objection to the rejoinder is that it does not allege the delay was by reason of any of the expected cases specified in the conditions under which the defendants claim exemption.

*McMichael*, contra. The rejoinder is sufficient, for the conditions set out shew the exemption of defendants from responsibility for any and every kind of delay.

WILSON, J., delivered the judgment of the Court.

The declaration charges neglect to carry and deliver generally, within a reasonable time.

The plea asserts that defendants carried the goods from St. Mary's to the station on the line nearest to Hamilton, the final destination of the goods, and then gave notice of their readiness and willingness to the Great Western Railway Company to deliver to them the goods to be carried by such company to Hamilton, and that the said company carried the goods to Hamilton.

The replication states that the plaintiff not only complains of the neglect and delay in the plea alleged, but for a delay of the goods at St. Mary's and for neglect to carry them from St. Mary's to Paris or Toronto on their way to Hamilton.

The rejoinder says nothing except that the goods were received under the special conditions and not otherwise.

The plea in substance is a plea of performance. But it does not allege that the defendants carried the goods from St. Mary's to their nearest convenient station to Hamilton within a reasonable time, nor that they gave notice within a reasonable time after the arrival of the goods at their station nearest to Hamilton, to the Great Western Railway Company, that they were ready to deliver the goods to such Company. If it had done so it would have been a complete plea of performance, according to the special contract set out in the plea.

It admits no delay or breach of any kind. The replica-

tion is not warranted therefore in alleging that the plaintiff sues not only for the neglect and delay in the plea mentioned, but for, &c. And the replication would have been unnecessary altogether if the plea had averred, as it should have done, that the acts stated as performance by the defendants of their contract had been done by them within a reasonable time. The plea in such case would, under the special conditions set up in it, have been an affirmation that the defendants did carry the goods from St. Mary's to Hamilton within a reasonable time according to the condition, and that would apply as well to the period before the goods were transmitted from St. Mary's as to any subsequent delay in the transit, and so it would have been a denial of the breach.

The plaintiff, instead of objecting to the plea, has restated his case, and has now said he complains of the delay at St. Mary's, and of the delay to carry from St. Mary's to Paris or Toronto, that is, of delay at St. Mary's before transmission, and of delay on the way between St. Mary's and Paris or Toronto after the transit was begun.

To this the defendants simply say, they received the goods under the special conditions, and under no other contract.

The rejoinder or plea to the new assignment is objectionable, because it alleges nothing whatever as an answer to the new assignment. That the defendants got the goods to carry under a special contract and no other, is no answer to the imputed delay in carrying the goods, for under any contract appearing on record the defendants were bound to carry the goods without delay, that is, within a reasonable time, unless the defendants bring themselves within the express terms of the condition alleging a delay of *trains*, which, by the strong language used, is to excuse the defendants from all liabilities whatsoever.

The defendants have relied on this condition as applicable to claims of every kind and for whatever cause arising, and as affording them an absolute exemption from all actions whatsoever.

But the language of that condition will not bear such an interpretation. It is a bar to all "claims arising from delay or detention of *any train*, whether in starting, or at any station, or in the course of the journey." The plaintiff's complaint covers a delay at St. Mary's in the store-house, and a complaint of delay on the transit.

The conditions do not shew an unqualified exemption from suit for and from everything, and they have pleaded nothing particularly as a defence which the conditions declare shall be a bar. The mere statement of the conditions, from which it appears the defendants may or may not have a defence according to circumstances, will not make a good plea. Such a statement cannot dispense with the necessity of the defendants applying the conditions to a certain state of facts which they must expressly set out as those upon which they rely as their ground of exemption. Neither their rejoinder nor their plea does so, and for that cause they are both objectionable.

The declaration would have been objectionable if it had not averred that a reasonable time for carrying the goods had been allowed to the defendants for the purpose after the delivery at St. Mary's Station, and before the commencement of the suit: *Stewart v. Eastwood*, 11 M. & W. 197; *Slade v. Hawley*, 13 M. & W. 757.

The proper plea, denying the breach, should have been in the terms of the breach, after setting out the special conditions or referring to them, that the defendants carried the goods from St. Mary's to Paris, (or Toronto, according to the fact,) within a reasonable time, and then within a reasonable time gave notice to the Great Western Railway Company, &c., (in substance the same as at the conclusion of the second plea), or sufficient of it which, according to the special conditions, would exempt the defendants from further accountability.

It is quite clear that while the plaintiff complains of delay in carrying his goods, the parties will never meet at a point, or come to issue, if the defendants are to answer only that they carried the goods, or that they carried them under specified conditions.

It is not the non-carriage which the plaintiff complains of, but *the delay* in carrying, while the defendants give no answer to the delay, but assert they completed the carriage. That may be true, but they may have been a year about it, and so guilty of neglect. If however the defendants rely on all excusability from suit, they fail to shew such a defence, or if they rely on exemption under certain circumstances, they have not shewn these circumstances, and pointed to the condition on which they depend for their defence.

It will be better the defendants should amend their plea, as intimated, and that the replication and rejoinder be withdrawn as unnecessary.

The plaintiff should have demurred to the plea.

If the plea be amended it will be without the costs of the replication, but upon payment, of course, of the costs of the demurrer. If the defendants do not amend their plea, there will be judgment on demurrer for the plaintiff for the insufficiency of the plea, defendants to elect within a fortnight, otherwise judgment.

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#### SCHAMEHORN v. TRASKE.

*C. S. U. C. ch. 19 sec. 175,—Construction of.*

*Held*, following *Jones v. Williams*, 4 H. & N. 706, that under the Division Courts Act, C. S. U. C. ch. 19 sec. 175, the Court has no power to stay proceedings in an action brought after the adjudication by the County Court Judge.

IN Michaelmas term last *S. Richards*, Q. C., obtained a rule on behalf of the plaintiff, calling on the defendant to shew cause why the order made by the Clerk of the Crown and Pleas herein should not be set aside and rescinded, and the plaintiff be allowed to proceed in this action without any stay or restraint, on the following grounds, namely, that this action was not brought until after the adjudication or decision of the County Court Judge, and

there was no authority under the statute to stay proceedings in this action ; that even if there were such authority under the statute, a case was not made out warranting any stay or restraint in this action : that there was no adjudication by the County Court Judge warranting any such stay or restraint : that the County Court Judge's decision was substantially a decision in favor of the plaintiff, and that the property was his, and there is no way of enforcing or obtaining the benefit of such decision other than by action : that the plaintiff has been deprived of his property by the wrongful act of the defendant, and he is not in a position to return the property as directed by the order of the County Court Judge ; that if the defendant has any defence he should be obliged to plead the same ; and on other grounds disclosed in the affidavits and papers filed.

The papers filed shewed that defendant was bailiff of the twelfth Division Court of the County of Wellington : that he received several writs of attachment from the said Division Court, and on the 7th of December, 1869, he took, among other goods, 2 steers, 1 heifer, 6 sheep, 1 cow, 1 colt, and 35 bags of wheat, as the property of the attachment debtors ; that seven days after seizure the plaintiff claimed the property particularly described as his. An interpleader summons was thereupon issued by the clerk of the Division Court, and served on the plaintiff on the 6th January, 1870, upon and to which the plaintiff appeared to support his claim.

The Judge of the Court made his order in these words : " I adjudge that the claimants have no claim to the waggon or fanning mill seized, and that the same are liable to be sold under the execution in favor of W. C. Wortley. And I order that the remainder of the property seized be returned to the claimants, and that the costs of this proceeding shall be taxed, and, that the same shall be paid out of the proceeds of the property above mentioned when sold by the bailiff ; that the claimants shall have no costs ; and that no damages have been claimed by the claimants. 21st February, 1870."

On or about the 29th December, 1869, the defendant was served with a notice of action intended to be brought by the plaintiff, and on the 25th of February thereafter this action was commenced. A declaration herein was filed on the 26th May last, and had been served. The count was in trover, alleging that the defendant wrongfully deprived the plaintiff of the use and possession of the articles claimed by, and ordered to be given up to the plaintiff, and for the conversion of them.

The plaintiff filed an affidavit, stating that after the adjudication of the County Court Judge, and before the commencement of this suit, he demanded the property in question from the defendant; the defendant said he could not return it, as he had sold it, and unless the plaintiff accepted what defendant said were the proceeds of the sale he, plaintiff, could get nothing; that the plaintiff declined to accept the sum offered, as it was not one-fourth of the value of the property, but said he would accept the value of the property.

The above are the facts which were before the Clerk of the Crown and Pleas in Chambers, and he made an order to the following effect :

“ It appearing to me that the defendant, as to the seizure by him as a Division Court bailiff of the goods in the declaration mentioned, is protected by the Interpleader proceedings and by the judgment therein of the learned Judge of the County Court, I do order that the plaintiff be restrained from relying at the trial of this cause upon the seizure of the said goods by the defendant as such bailiff as a conversion thereof, and as respects proceedings for or in respect of the said seizure this action be stayed. But nothing herein shall be taken to restrain the plaintiff, if he legally can or may, from shewing a sale of the said goods by the defendant or his agents, or the non-delivery thereof by the defendant, or his refusal to deliver the same to the plaintiff after the said judgment in the Interpleader proceedings, as evidence of a conversion of the goods by defendant. And I do order that the plaintiff have leave, if he shall be so advised, to add a count to his declaration alleg-

ing the non-delivery of the goods or the refusal to deliver the same according to the said judgment as a breach of duty on defendant's part."

In addition to these proceedings the following further affidavits were filed on the motion for and on the argument of the rule.

The plaintiff's affidavit stated that before the defendant took any proceedings for an Interpleader he had handed over the said goods seized by him to the clerk of the Division Courts, and they were sold by the Division Court clerk before the County Judge made the order for the return of the said goods to the plaintiff. The affidavits for defendant stated, that the plaintiff at the time of the Interpleader trial was well aware his goods had been sold, and was present at the sale.

*McGregor* and *Guthrie* shewed cause. The sections of the Division Courts Act, Consol. Stat. U. C. ch. 19, to be considered are 175, 208, and 213. The defendant as bailiff is entitled to protection in this Court by reason of the adjudication on the interpleader proceedings: *Washington v. Webb*, 16 U. C. R. 232, is in point. The protection applies as well when the action is brought after the Interpleader adjudication, as where an action has been brought before and is pending at the time of adjudication. If the statute did not apply in both cases, the claimant could always avoid the adjudication and defeat the statute by delaying his action until after the interpleader proceedings were terminated. The plaintiff knew at the time of the adjudication his goods had been sold; he was at the sale; yet he said he made no claim for damages before the Judge, though he was asked whether he claimed them or not. It was for him to have stated to the Judge that his goods had been sold, when he was before the Judge.

*S. Richards*, Q. C., supported the rule. The order of the County Judge directs that the property in question be returned to the plaintiff. How is he to get it back, if the bailiff refuse to deliver it, unless by action? Yet this

action the Clerk of the Crown and Pleas has stayed. This Court has no power to stay an action commenced after the adjudication in the interpleader suit. The statute in express terms applies only to actions pending at the time of the interpleader suit, and such an action is only stayed by the proceedings in the inferior court until such proceedings are determined. This Court in any case can do no more, however liberally the statute be construed, than the County Judge could have done, and neither he nor this Court can compel the bailiff to restore the property to the plaintiff; the remedy is by action. The adjudication made is not a *judgment* of the Division Court, and cannot of course be enforced as a judgment.

The following cases were referred to by the Clerk of the Crown and Pleas: *Abbott v. Richards*, 15 M. & W. 194; *Hollier v. Laurie*, 3 C. B. 334; *Winter v. Bartholomew*, 11 Ex. 704; *Cater v. Chignell*, 15 Q. B. 217; *Jones v. Williams*, 4 H. & N. 706.

WILSON, J., delivered the judgment of the Court.

I was at first strongly inclined to think that the Court would stay all actions brought after the adjudication by the County Judge in the Division Court, as well as those brought before or pending at the time of his adjudication.

The wording of the 175th section of the Division Courts Act does not in words extend to such subsequent actions. The language is, that on the issuing of an interpleader summons any action *which has been brought* in any of the superior courts, or local or inferior courts, in respect of such claim shall be stayed.

This section is precisely the same as that of the Imperial Act 9 & 10 Vic., ch. 95, sec. 118, and under it, in *Jones v. Williams*, 4 H. & N. 706, the defendant applied to stay proceedings in an action after the adjudication in the County Court, which had been brought against him in respect partly of the matters which had in fact been adjudicated upon. The Court however declined to interfere, leaving the defendant to set up his defence by plea.

The Chief Baron said: "The construction is far too doubtful to warrant us in staying the proceedings." Martin, B., said: "My impression is, that the power to stay proceedings extends only to actions brought before the interpleader summons in the County Court, and that the question as to the effect of the adjudication on any action afterwards brought must be raised by plea, and not by an application to stay the proceedings. The Court does not interfere summarily except the case is clear." Watson, B., said during the argument, "The words 'thereupon any such action which shall have been brought,' refer to suits then existing."

In *Cater v. Chignell*, 15 Q. B. 217, the point was not raised, and the other cases cited were decided under the interpleader act, which is more comprehensive than the section in question.

*Jousiffe v. Bayley*, 15 L. T. N. S. 219, Ex., is also a case where the action was brought after the adjudication by the County Court Judge, and his adjudication was pleaded.

We must follow these authorities, although but for them we should have been disposed to hold that, inasmuch as the Judge has power to summon the parties before him, "whether before or after an action has been brought against such officer," and to adjudicate "upon the claim" made, and to make a decision upon such claim which "shall be final and conclusive between the parties," the Courts would have given effect to his decision by the summary relief of staying the proceedings.

The rule will therefore be absolute to rescind the order made in chambers, but without costs; the defendant to plead within fifteen days.

*Rule absolute.*

During this Term the following gentlemen were called to the Bar:—JOSEPH TIMOLEON ST. JULIEN, HENRY FRANCIS HOLLAND, EDWARD BURNS, GEORGE ANTHONY BOOMER, FRANCIS ARNOLDI, CHARLES ALLAN BROUGH, DOUGLAS SHELDON SMITH, DAVID LYNCH SCOTT, WILLIAM JOHN GREEN, FREDERICK GEORGE AUGUSTUS HENDERSON, WALTER MATHESON, DANIEL WADE, JAMES HOLMES MACDONALD, MICHAEL HOUSTON, EDWARD HANDLEY SMYTHE.

HILARY TERM, 34 VICTORIA, 1871.

(From 6th February, to 18th February.)

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*Present :*

THE HON. WILLIAM BUELL RICHARDS, C. J.

“ JOSEPH CURRAN MORRISON, J.

“ ADAM WILSON, J.

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PACAUD V. MCEWAN.

*Refusal to assign replevin bond—Action for—Plea, recovery by plaintiff from third party.*

Declaration, that the defendant, as sheriff, took from H. and two sureties a bond in \$1,800, conditioned for said H. prosecuting with effect and without delay an action of replevin brought by him against the plaintiff: that H. did not so prosecute the suit, nor did he make a return of the goods; and that defendant refused to assign the bond to the plaintiff, whereby the plaintiff was hindered from suing on the bond, and deprived of the means of recovering the value of the goods and the costs, &c.

Plea, as to so much as alleges that the plaintiff is deprived of the means of recovering the value of the goods, that the goods were replevied by defendant from the Great Western R. W. Co., and that the plaintiff afterwards recovered from said Company the full value of such goods in an action against them as common carriers, for non-delivery of said goods.

*Held*, on demurrer, plea bad, for it did not shew that the plaintiff was not delayed in recovering the value of the goods by defendant's refusal to assign, and it was pleaded to damages only.

DECLARATION, that one Moses E. Hart, on the 3rd of September, 1867, commenced an action of replevin in this Court against the plaintiff, by a writ issued out of this Court directed to the defendant, as sheriff, and delivered to him, whereby the defendant was commanded that he should without delay cause to be replevied to the said Moses E. Hart certain goods, chattels, and personal pro-

perty therein mentioned, which the said Hart alleged to be of the value of \$600, and which the plaintiff had taken and unjustly detained, as it was said ; and thereupon the defendant, so being sheriff, did take from the said Moses E. Hart, Pierre Eleazar Pothier, James Dubois, and Louis Neveux, as responsible sureties, a bond in the sum of \$1,800, conditioned for the said Hart prosecuting his suit with effect and without delay against the plaintiff for the taking and unjustly detaining the said goods, chattels, and personal property. And thereupon the defendant, so being such sheriff, replevied and made deliverance of the said goods, chattels, and personal property to the said Hart. And the said Hart did not prosecute his said suit with effect and without delay, nor did he make a return of the said goods, chattels, and personal property, whereby the said writing obligatory became and was forfeited to the defendant, and the plaintiff became and was entitled to have the same assigned to him, and applied to the defendant so to assign the same, but the defendant wholly neglected and refused so to do, and the plaintiff is thereby hindered and prevented from bringing an action on the said writing obligatory, and is deprived of the means of recovering the value of the said goods, chattels, and personal property, and the costs incurred by him in the said action, and has been otherwise greatly injured.

*Plea*, as to so much of the said declaration as alleges that the plaintiff is deprived of the means of recovering the value of the said goods and chattels, that the said goods and chattels were taken and replevied by the defendant from the Great Western Railway Company of Canada, in whose possession the same were at the time of the delivery of the said writ of replevin to the defendant : that the plaintiff afterwards brought an action against the said Company as common carriers in the proper Court in that behalf, for the non-delivery by them of the said goods, in which action such proceedings were had and taken that the plaintiff, by the consideration and judgment of the said Court, reco-

vered from the said Great Western Railway Company the full value of the said goods so taken by the defendant under the said writ, and the same has been fully paid and satisfied to him by the said Company.

Demurrer.

*Burton*, Q.C., for the demurrer, cited *B. & L. Prec.*, 3rd ed. 14; *Porter v. Izat*, 1 M. & W. 381.

No one appeared for the defendant.

WILSON, J., delivered the judgment of the Court.

The plea, though professing to answer the allegation of the plaintiff that he was, by the sheriff's refusal to assign the bond, deprived of the means of recovering the value of the goods, does not shew that the plaintiff was not so deprived of the means of recovering them for a considerable time after the forfeiture of the bond, and before he finally recovered their value from the Railway Company.

The plea may be a bar on the merits, for a recovery against a wrong-doer to the full value of the goods vests by operation of law the property in those goods in the defendant: *Cooper v. Shepherd*, 3 C. B. 266; although the judgment remains still unsatisfied: *Buckland v. Johnson*, 15 C. B. 145; 6 M. & G. 640, note. But see *Marston v. Phillips*, 9 L. T. N. S. 289.

Here, then, it is shewn the plaintiff is not entitled to recover the goods, for the title to them is changed by the recovery as against all the world. But the same vice still exists in the plea, that it does not shew the property was so changed before the forfeiture of the bond, or even before the commencement of this suit.

The plea is also bad as pleaded to the damages only. The bond is not one on which, by the statute 8 & 9 Wm. III., ch. 11, breaches need be assigned. A sufficient breach had been already assigned.

The bond, as set out, contains nothing about making a return of the goods, though the plaintiff treats it as if it did, by alleging their non-return. The parties to the bond

are not therefore liable on *it* for the non-return of the property, and so the plaintiff could not be damnified by being deprived by the defendant's act of the means of recovering the goods. The whole of that may be struck out, and the plaintiff will still be entitled to recover.

There will therefore be judgment on demurrer for the plaintiff.

*Judgment for plaintiff.*

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REGINA V. BOARDMAN.

*Tavern and shop licenses—Powers of Dominion and Local Legislatures—B. N. A. Act, sec. 91, No. 27; sec. 92, Nos. 9, 15, 16—Criminal law.*

The Legislature of Ontario having passed an Act to regulate tavern and shop licenses, 32 Vic. ch. 32, under the power given to them by the British North America Act, 1867, sec. 92, Nos. 9, 16: *Held*, that they had power, under No. 15, to enact that any person who, having violated any of the provisions of the Act, should compromise the offence, and any person who should be a party to such compromise, should on conviction be imprisoned in the common gaol for three months; and that such enactment was not opposed to sec. 91, No. 27, by which the criminal law is assigned exclusively to the Dominion Parliament.

THE prisoner had complained of one George Lindsay for selling ale by retail without having obtained a license authorizing him so to do, and he compromised the matter with Lindsay by receiving \$20, and a further sum of \$5 for expenses. The chief constable of the City of Toronto made a complaint against Boardman for compromising, settling, and compounding the said offence, with a view of stopping or having the same dismissed for want of prosecution, on which the prisoner was convicted, and sentenced to three months imprisonment in the common gaol.

The prisoner having been brought up by *habeas corpus*, *Harrison*, Q.C., moved for his discharge out of custody, on the ground that the Local Legislature of the Province of Ontario had no power, in passing an Act to regulate tavern and shop licenses—32 Vic. ch. 32—to declare, under sec. 39, that “any person who, having violated

any of the provisions of this Act, shall compromise, compound, or settle, or shall offer or attempt to compromise, compound, or settle the offence with any person or persons, with the view of preventing any complaint being made in respect thereof, or if complaint shall have been made with the view of getting rid of such complaint or of stopping or having the same dismissed for want of prosecution or otherwise, shall be guilty of an offence under this Act, and, on conviction thereof, shall be imprisoned at hard labour in the common gaol of the County in which the offence was committed for the period of three calendar months."

Section 33: "Every person who shall be concerned in or be a party to the compromise, composition, or settlement mentioned in the next preceding section, shall be guilty of an offence under this Act, and, on conviction thereof, shall be imprisoned at hard labour in the common gaol of the County in which the offence was committed for the period of three calendar months."

*Scott*, on behalf of the Attorney-General, shewed cause against the discharge of the defendant, and contended that the other provisions of the 32 Vic. ch. 32 being clearly within the authority given to the Ontario Legislature, under the British North America Act, 1867, sec. 92, Nos. 9, 16, they had power, by No. 15, for the purpose of enforcing such provisions, to pass the clauses complained of.

*Harrison*, Q. C., contra, urged that the effect of sec. 32 being to create an offence punishable by hard labour, in other words, a crime, it was an enactment relating to the criminal law, a subject exclusively assigned to the Dominion Parliament, and therefore beyond the power of the Local Legislature. He cited *In re Lucas* and *McGlashan*, 29 U. C. R. 81, and the cases there referred to; *Butt v. Conant*, 1 B & B. 574-5; *Regina v. Mason*, 17 C. P. 534; *In re Meyers* and *Wonnacott*, 23 U. C. R. 611.

RICHARDS, C. J., delivered the judgment of the Court.

By the British North America Act of 1867, sec. 91, the Dominion Parliament has power to make laws for the peace,

order, and good government of Canada, in relation to all matters not coming within the classes of subjects by that Act assigned exclusively to the Legislatures of the Provinces; and for greater certainty, but not so as to restrict the generality of the terms in the section, it was declared that, notwithstanding anything in that Act, "the exclusive legislative authority of the Parliament of Canada extends to all matters coming within the classes of subjects next thereafter enumerated," and amongst them, No. 27, "The criminal law, except the constitution of courts of criminal jurisdiction, but including the procedure in criminal matters."

Under the head of "exclusive powers of Provincial Legislatures," by sec. 92, it is provided, that in each Province the Legislatures may exclusively make laws in relation to matters coming within the classes of subjects next thereafter enumerated, and amongst other things, No. 9, "Shop, saloon, tavern, auctioneer, and other licences in order to the raising of a revenue for provincial, local, or municipal purposes." And, No. 15, "The imposition of punishment by fine, penalty, or imprisonment, for enforcing any law of the Province made in relation to any matter coming within any of the classes of subjects enumerated in that section." And, 16, "Generally all matters of a merely local or private nature in the Province."

There seems no reasonable doubt that under sec. 92 and Nos. 9 and 16, the Local Legislature not only had power but the exclusive right to legislate in relation to shop, tavern, auctioneer, and other licences, in order to raise a revenue.

It seems equally clear that they had the right to impose punishment by fine, penalty, or imprisonment for enforcing any law properly passed by them on matters within their exclusive jurisdiction.

Mr. *Harrison* in his argument referred to *Lucas v. McGlashan*, decided in this Court, and the authorities there cited and referred to, to shew that when a penalty is imposed on a defendant as a punishment for the violation of an Act of Parliament, not imposed for private purposes, but

for public objects, and when such penalty is recoverable in a summary way before a justice of the peace, who may commit the offender to the common gaol until the penalty is paid, that the offence which may be punished in such a manner is a crime, and if so *a fortiori* it is a crime when the punishment is imprisonment in the common gaol and not a fine at all. And the argument was then pushed to the full extent, that the decided cases shewing that an offence so created is a *crime*, the law creating it must be a criminal law, and under the Dominion Act the power to pass criminal laws is exclusively in the Dominion Parliament.

But there can be no doubt that it was intended that the Local Parliament should not only have power but the exclusive right to legislate on some subjects, and to impose punishment by way of fine and imprisonment for enforcing the laws they may make in relation to those subjects. We think we must therefore come to the conclusion that when the Imperial Parliament used the words, "The Criminal Law" and "including the procedure in criminal matters" in the British North America Act they did not mean that the Local Legislature had not the power to legislate so as to punish by fine or imprisonment, with the view of enforcing the laws, when such power is expressly given by that Act.

The conclusion which we may properly arrive at is, that they shall have the exclusive power to legislate in this way in those matters in which power is not given to the Local Legislature to legislate.

In *The Attorney General v. Radloff*, 10 Ex. 96, Baron Martin says: "There are many *crimes*, properly so called, which are liable to be punished on summary conviction. But there are a vast number of *acts* which in no sense are *crimes*, which are also so punishable; such, for instance, as keeping open public houses after certain hours, and a variety of breaches of police regulations, which will readily occur to the mind of any one. The bringing tobacco into this kingdom is of itself a perfectly innocent act; but the requirements of the public revenue, which induce the Legislature to impose a very high duty upon this article, probably

render it matter of necessity that the bringing it into the kingdom without payment of the duty should be subjected to a penalty. But this cannot affect or alter the intrinsic and essential nature of the act itself, and it seems to me that it cannot be denominated a 'crime,' according to the ordinary and common usage of language, and the understanding of mankind."

I refer to this language, not as shewing that the case in our own Court and those there cited were not properly decided, but as indicating the popular idea of criminal law, in which view it may have been used in the statute. The cases referred to by my brother Wilson in *Lucas v. McGlashan* shew the extreme length to which the definition of crimes and criminal law and civil proceeding may be carried, such as parties being indicted for non-payment of assessments which the statute makes it obligatory on them to pay: *Regina v. Sutcliffe*, 13 Q. B. 833. An innkeeper may be indicted for not receiving a guest at his inn, he having no lawful excuse for his refusal: *Rex v. Ivens*, 7 C. & P. 213. And it is said to be the test of an act being a crime whether an indictment will lie for it: *Bancroft v. Mitchell*, L. R. 2 Q. B. 549; *Regina v. Master*, L. R. 4 Q. B. 289, per Mellor, J. The old appeal of murder was a civil proceeding, though the defendant was hanged if the verdict was found against him: *Ashford v. Thornton*, 1 B. & Al. 405.

These cases shew the difficulty of construing the British North America Act in the rigidly technical manner that we were pressed to do on argument.

The Local Legislature then having the exclusive right to legislate in relation to shop and tavern licenses, &c., and having power to impose punishment by fine or imprisonment for enforcing that law, to encourage prosecutions for breaches of the law, and as a means of enforcing it, gives the informers or prosecutors a share of the pecuniary penalties that may be recovered for such breaches of the law, and with a like object, to secure the enforcement of the law. By the 32nd section they provide for the imprisonment, at hard labour in the common gaol, of any person who had violated

the statute, who should compound or settle the offence with any person with a view of stopping the prosecution or getting rid of the complaint. And by the 33rd section they provide a punishment for every person who shall be concerned in, or be a party to such compromise or settlement.

This all seems to us to be within the reasonable scope of the powers conferred on the Local Legislature. What has been done by this section was done with a view of effectually enforcing the law which they had the power to make, and which seems to be a matter of a merely local character.

If the Local Legislature were to pass a general law forbidding the compounding or settling of the offence by any person who had been guilty of a violation of local statutes, and declaring the same to be a misdemeanor for which the party could be indicted and punished by fine and imprisonment, that might with more propriety be considered as passing a criminal law and regulating the procedure in it. But in this case it seems not an unreasonable mode of ensuring the proper enforcement of the primary object of the law, the preventing of parties from exercising the calling of shop, saloon, or tavern keeper, without obtaining and paying for the proper license for that purpose.

The object of giving half the penalty to the informer was clearly with a view of enforcing the law by the conviction and punishment of those who violated it, and the punishment of those who prevented the enforcement of the law by compromising the proceedings taken, or which might be taken, to enforce it, is for the same object, and seems not unreasonable to secure obedience to the law which they had the power to make.

We think the prisoner should be remanded for the remainder of his term of imprisonment.

*Prisoner remanded.*

## GREAT WESTERN RAILWAY COMPANY V. McEWAN.

*Trespass for goods—Jus tertii—Sheriff.*

In trespass for taking goods it appeared that the goods came to the plaintiffs' warehouse at Windsor consigned to one P., and were seized there by defendant under a writ of Replevin sued out against P. by one H.; P. asserted that he had bought the goods from H., which H. denied, and the Judge before whom the case was tried, without a jury, found that the goods belonged to H. *Held*, that the defendant, not being a mere wrongdoer, was at liberty to dispute the plaintiffs' title, and set up the title of H., under a plea of not possessed, and that he was therefore entitled to a verdict on the finding.

TRESPASS for seizing and taking the plaintiffs' goods.

Pleas. 1. Not guilty. 2. Goods not the plaintiffs'. Issue.

The special plea and subsequent pleadings were before disposed of on demurrer (*a*).

The cause was tried before Hagarty, C. J., C. P., at the Fall Assizes of 1869, at Sandwich, without a jury, when he gave a verdict for the plaintiffs with \$630.90 damages.

It was proved that the goods arrived at the plaintiffs' warehouse at Windsor in August 1867, directed to Pacaud, and that the defendant took the goods under a writ of replevin sued out by one Moses E. Hart against Pacaud, and placed in the defendant's hands as sheriff to be executed. The goods were taken by defendant on the 7th September, 1867, from the plaintiffs' agent at Windsor. Pacaud some time before the sheriff's seizure paid the plaintiffs the freight and desired them to keep the goods for him. The value of the goods was proved, and the amount of freight paid.

The defence was as follows:—

*Pierre Pothier* said: "I know Hart, he lives in Lower Canada; I was Hart's agent; Pacaud came to Three Rivers from Michigan; I said I was going to make auction in the country of some goods of Hart's; he said if I would go to Ionia, Michigan, I could sell them well; I resolved to go, but was not ready at once; he said he was going, and if I

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(*a*) See Great Western R. W. Co. v. McEwan, 28 U. C. R. 528, where the action is erroneously stated as being replevin instead of trespass.

gave him the goods he would deliver them to me in Windsor, and they would be ready for me; he left, and waited at Montreal for me; I followed; I sent the goods to Montreal, consigned to Pacaud; I don't know how they got on to Windsor; I started and met him in Montreal, and he and I started for Windsor, the goods having gone on before; we came to Windsor and crossed to Detroit; he went on to Ionia, saying he would return; he came in a couple of days; I told him the goods were here; he told me I must give him money to pay the freight; he asked me for an invoice, as the plaintiffs would require it before they gave up the goods to him; I did so; I did not know the contents of the casks; I never sold them to him; he never was the owner; I expected the goods were to be sold by me by auction at any place; he claimed the goods as his; I was here when Pacaud telegraphed not to deliver the goods to any one but himself; I demanded the goods from the plaintiffs; they would not deliver them to me, as my name was not Pacaud; I got the replevin issued, and went with the defendant to get them, and I authorized him to take them; defendant delivered them to me.

In cross-examination he said: "I was a witness at Detroit on the trial of a suit brought by one Hall against these plaintiffs, who lost the suit (objected to); I never sold to Pacaud; I made the invoice because he said he could not otherwise get the goods here; I thought he would do right, and would afterwards give me the goods; I gave him the invoice and money to pay the freight; the goods came from our cellar at Three Rivers; they were Hart's property; I am the man mentioned in document produced" (as to character, certificate of conviction for obtaining goods with intent to defraud) "the goods left Three Rivers with Pacaud on Friday; I followed to Montreal, leaving home on Sunday."

For the plaintiffs, in reply, *George E. Bastedo* said: "I am post-master at St. Maurice, twelve miles from Three Rivers, and a merchant; I remember being in Hart's store at Three Rivers with Pacaud; Pothier was in a back room in the shop; Pacaud went back to him; Pothier offered to sell

to me on credit for a year ; I said if I bought I did not want to pay to Hart, but to him ; he said, Pay me, it is my own business ; we went to the cellar ; he told Pacaud he could take the syrup and tobacco ; Pacaud said he would ; Pacaud took tobacco and cigars in box, and Pothier marked down the goods on a paper on his desk ; it was like an account ; he shewed Pacaud the liquors in the cellar ; he said to him the brandy was good, and he could sell it well in the United States, if he could pass it ; I understood Pacaud was to buy these goods, and that Pothier was selling them ; I heard nothing as to the price, they did not speak of prices before me ; I bought tobacco and syrup at prices named by Pothier, and Pacaud knew the prices, but I bought no brandy or sherry ; Pothier also offered me liquors ; I don't remember the price, nor do I think he told me."

In cross-examination he said : " Pacaud is my brother-in-law ; he told me I could get credit for goods from Pothier ; I bought forty odd dollars' worth from him ; I heard nothing said as to taking goods to Michigan to be auctioned ; Pothier said to Pacaud, pointing to tobacco, syrup, and brandy, ' these are the goods you ought to take with you ' ; I did not read the paper Pothier wrote at the desk ; he read the names of the articles put in a box to be sent to the United States, so they both said ; I cannot remember the articles ; there were cigars I know with them ; if I had heard nothing from Pacaud I would have supposed Pothier was trying to sell goods to Pacaud ; I saw a load of liquors going away from Pothier's to steamboat ; two loads went so ; barrels were there." The witness finally said, that apart from what Pacaud told him he would not say if the goods were sold to Pacaud or not.

The learned Chief Justice ruled as follows : " I have some hesitation as to the facts, but as the case stands, I find the goods were really Hart's goods ; that Pacaud, as far as the plaintiffs were concerned, was *prima facie* the owner, holding the invoice, and being the consignee."

The verdict was then entered for the plaintiffs, as before stated, with leave to defendant on the evidence, law, and

finding, to move to reduce the damages to a nominal sum, or to enter the verdict for the defendant, if the Court should be of opinion the defence was made out.

In Michaelmas Term, 1869, *O'Connor* obtained a rule calling on the plaintiffs to shew cause why the damages should not be reduced, or a verdict entered for the defendant, pursuant to such leave.

In Hilary Term, 1870, *Anderson* shewed cause. The defendant as sheriff, when acting under the writ of replevin, was not the agent of or for the third person, Hart, whose title he sets up as against Pacaud and the plaintiffs, but the officer of the Court. The replevin, too, was procured not by Hart, the alleged owner, but by Pacaud his agent, who had power to sell and to forward the goods. The defendant cannot however, be permitted to set up the *jus tertii* at all, because the self-same facts which were proved at the trial were held to constitute no defence when set up as a plea: *Great Western R. W. Co. v. McEwan*, 28 U. C. R. 528; and *Biddle v. Bond*, 6 B. & S. 225; 11 Jur. N. S. 425.

*Robinson*, Q.C., supported the rule. The evidence shewed the goods belonged to Hart, who, by Pothier, sued out the writ of replevin against Pacaud, under which the sheriff delivered the goods to Pothier for Hart. There was evidence therefore of a better title than the plaintiffs had, and that the sheriff acted under that better title. This the sheriff might shew to defeat the plaintiffs' recovery. A carrier may set up the *jus tertii* without authority of the owner, if the person who claims the goods has obtained them by fraud: *Angell on Carriers*, secs. 335, 336; *Sheridan v. The New Quay Co.*, 4 C. B. N. S. 618, 649; *B. & L. Prec.*, 3rd ed., 229, 293, 717, and cases there cited.

WILSON, J.—It appears from the evidence that Hart was originally the owner of the goods, and that Pothier was Hart's agent to sell them.

Pothier sent the goods by some arrangement between him and Pacaud from Hart's place of business at Three Rivers,

consigned to Pacaud at Montreal. They were afterwards sent on to Windsor, by whom Pothier did not know, but by the arrangement before referred to they were to have been delivered to him by Pacaud at Windsor. The further consignment of the goods to Windsor, and their arrival there, were plainly therefore in pursuance of the original design between these two.

Pothier must have taken or appropriated the goods fraudulently and criminally to his own use, or he and Pacaud must have done so; or he must have sold the goods to Pacaud.

He was convicted in the Province of Quebec, in 1868, of obtaining the goods with intent to defraud, and he denied positively ever having sold the goods to Pacaud.

If the goods had not been sold to Pacaud, they were still the property of Hart, and he could claim them from the plaintiffs while they had them in their warehouse at Windsor: *Wilson v. Anderton*, 1 B. & Ad. 450. And if the plaintiffs refused to deliver the goods on demand, their refusal would be evidence of a conversion, for which, under our statute, proceedings in replevin might have been taken against them.

That was not done, though the goods were taken from them by authority of the writ sued out against Pacaud. Such a taking it was determined by this Court could not be justified, for it was not by process against the plaintiffs. (a)

Whose property the goods were, was not determined on demurrer: that question has still to be settled.

It is of course quite clear that if the goods were really sold to Pacaud, Hart had no business to take them from the plaintiffs; and he, if he actually intervened, and the sheriff, who it has been said exceeded his authority, would be answerable to the plaintiffs as bailees for the value of the goods. That is not disputed.

What it is that is asserted is, that Hart did not sell the goods at all; that Pacaud had no rightful property in them, and that when they were taken from the plaintiffs under the replevin they were still the goods and property of Hart.

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(a) See *Great Western R. W. Co., v. McEwan*, 28 U. C. R. 528.

If this be so, the plaintiffs have no right to recover in the suit.

The learned Chief Justice said he had some hesitation as to the facts, but he found the goods were really the goods of Hart, though so far as the plaintiffs were concerned Pacaud was the *prima facie* owner of them.

This in my opinion is equivalent to a finding for defendant.

If Pothier, or Pothier and Pacaud together, got the goods by felony, Hart might still follow them in the hands of a third person, though he had not prosecuted the offender or offenders: *White v. Spettigue* 13 M. & W. 603; *Stone v. Marsh*, 6 B. & C. 551. So Hart might also repossess himself of them by force sufficient for the purpose, without process at all: *Blades v. Higgs*, 10 C. B. N. S. 713.

The plaintiffs as warehousemen or bailees can have no better title than their bailor had; they could, after notice to them by Hart of his title and demand made upon them by him, have set up his title against Pacaud's claim: *Sheridan v. The New Quay Co.*, 4 C. B. N. S. 618, 649; *Thorne v. Tilbury*, 3 H. & N. 534; *Biddle v. Bond*, 11 Jur. N. S. 425.

It is always open to the sheriff, when sued by one whose title he denies to the goods he has seized, to traverse the plaintiff's property in the goods. If the action is by the execution debtor the justification would be under the writ; if by a third person the defence must and can only be by a traverse of the plaintiffs' property: *Harrison v. Dixon*, 12 M. & W. 142.

It is not permitted, as a general rule, to a mere wrong-doer to set up the rights of third persons; but the sheriff is not a mere wrong-doer, as the previous case shews, and also *Leake v. Loveday*, 4 M. & G. 972.

This is a very unfortunate matter altogether, for the plaintiffs have in fact been sued by one Hall, the purchaser from Pacaud, in the United States Courts, and been compelled to pay the amount of the goods to him. How that was we do not know, for as the goods were taken from the plaintiffs by superior force, and by process of law, there

certainly was no conversion by them: *Mires v. Solebay*, 2 Mod. 242; *Barnard v. How*, 1 C. & P. 366; nor any other liability, unless there was a refusal to deliver to Pacaud before the execution of the replevin; and even then the plaintiffs should have succeeded upon establishing Hart's better title.

Whether that was done or not, or however the recovery against the plaintiffs may have been obtained, it cannot affect this suit.

If the writ of replevin had been against the plaintiffs, the defendant could have justified in this action under the writ, just as he might have done if the execution debtor under a *feri facias* had sued him.

But as he cannot defend himself by a special plea of justification under the execution when the action is brought by a third party, but must traverse the property in the goods, so he must shape his defence in like manner when he has made a seizure under a writ of replevin.

In this manner, and for this cause, and to that extent, the defendant failed on the demurrer.

Whether there is any difference in acting under a writ of replevin, which commands the sheriff to take the *specific* property and which is alleged in the writ to be the property of the claimant, and acting under a *feri facias*, which simply commands the sheriff to take the debtor's goods, has not been considered.

The general rule is, that whatever is done under the direction of the court cannot be treated as a wrong.—“*Actus curiæ neminem gravabit* :”—*Broom* Leg. Max.; *Walker v. Olding*, 1 H. & C. 621.

The sheriff could have taken these goods from the plaintiffs' possession under a *feri facias* at the suit of any one against Hart, or if they were Pacaud's at the suit of any one against Pacaud, for the mere bailee's possession is the possession of the bailor or true owner. So if these goods had been liable to distress for Hart's or for Pacaud's rent, and they had been fraudulently removed by them off the demised premises, they could have been followed to the

plaintiffs' premises and taken there. Why they could not equally have been taken, under our statute and the circumstances under which Hart lost the goods, from the plaintiffs as mere bailees by the writ of replevin may require to be considered. The 9th and 10th sections of the Replevin Act are provisions as to using force in breaking the premises in which, or in searching the person and premises on which, the goods are supposed to be concealed, and do not apply to the case of a seizure on a mere bailee's premises, where the doors are open and no force is used or intended to be used.

That this is a very unfortunate proceeding to the present litigants is obvious.

The present position of the parties seems to be as follows : Hart, the alleged owner of the goods, got them by writ of replevin against Pacaud. Pacaud, the alleged purchaser, recovered their value in the United States Court from the plaintiffs. The plaintiffs claim to be indemnified for their loss by this action against the defendant ; and the defendant resists their claim.

The parties really interested are thus satisfied, and now stand aside as spectators of the contest going on between the warehousemen and the sheriff, as to which of *them* shall bear the loss of the Lower Canada transaction.

We wish we could relieve them both, but so far as this suit is concerned we think the plaintiffs cannot shift the loss from themselves to the defendant. Under the plea of not possessed, and on the facts and the finding of the learned Chief Justice, the defendant is entitled to the *postea*.

The rule will therefore be absolute on the leave reserved to enter a verdict for the defendant on the second issue, leaving the verdict for the plaintiffs as it is on the first issue.

MORRISON, J., concurred, saying that he had great doubts, but did not feel strong enough to dissent formally.

RICHARDS, C.J., not having been present during the argument, gave no judgment.

*Rule accordingly.*

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## O'HARE V. M'CORMICK.

*Lease—Forfeiture—Re-entry.*

One G., a Rector, in 1861, leased land to the plaintiff for 21 years, at an annual rent, with a proviso for re-entry on non-payment. The plaintiff entered and paid rent until the summer of 1865, when he went away from the county, leaving nearly a year's rent over due, and giving the key to a person in the adjoining house. In July, 1866, the premises being then vacant, G. went to England, leaving a power of attorney with his son, authorizing him to collect and distrain for his rents, and to commence and prosecute all actions and other proceedings which might be expedient to be done or prosecuted about the premises as fully as if he were present. Defendant in some way got the key and went in, and afterwards obtained a lease from G.'s son for 21 years. G. on his return, in 1866, recognized this lease, and received rent under it regularly from defendant until 1868, when the plaintiff brought ejectment, claiming under his lease from G.

*Held*, that the facts shewed a sufficient re-entry by G. to avoid the plaintiff's lease, and that the plaintiff therefore could not recover.

*Quere*, whether the son was authorized, under the power of attorney, to bring ejectment and enter for the forfeiture.

*Seemle*, that the lease to the plaintiff was binding on the Rector and those claiming under him until forfeited.

EJECTMENT for the north half of lot one on Colborne street, in the town of Belleville, as laid out on a certain plan made by one John Y. Hazlitt, D. P. S., for the Reverend John Greer. The action was commenced on the 16th April, 1868.

The plaintiff in his notice claimed by virtue of a lease from the Rev. John Greer to him, dated 1st May, 1861.

The defendant, besides denying the plaintiff's title, claimed title in himself by virtue of a lease from the Rev. John Greer, for 21 years, dated 29th August, 1866, executed after the plaintiff's lease had become forfeited under the covenant that the said John Greer might re-enter for non-payment for forty days, and for non-payment of taxes. The defendant also, by leave of a Judge, amended his notice of title by also claiming possession by the authority of the said John Greer, the former landlord of the plaintiff, who before action entered under a proviso for re-entry for non-payment of rent contained in the lease made by him to the plaintiff, under which the plaintiff claims.

The cause was tried at the last Spring Assizes at Belleville, before Gwynne, J., without a jury.

A lease was proved, dated 1st May, 1861, made pursuant to the Statute for facilitating the leasing of lands, between the Rev. John Greer, Rector of Belleville, of the one part, and the plaintiff of the other part, whereby the lessor demised and leased to the plaintiff the premises in question, being part of the glebe lot on the west side of the river Moira, in Belleville, to hold to the plaintiff, his executors, administrators and assigns, for 21 years from the date, paying yearly and every year during the term unto the said John Greer, his successor or successors in office, £3 2s. 6d., in two half-yearly payments of £1 11s. 3d. each, on the first days of May and November in each year. The plaintiff covenanted to pay the rent and all taxes. Proviso for re-entry by the said John Greer, or his successor or successors in office, on non payment of the rent for forty days after any of the days on which the same ought to have been paid, or non-performance of the covenants.

The plaintiff entered under the lease and paid rent for three or four years. He left the premises and that part of the country in the summer of 1865. There was nearly a year's rent due in May 1865. In July, 1866, Mr. Greer left for England. The premises were vacant then. He executed a power of attorney under his hand and seal, on the 25th July 1866, constituting his son John Allan Greer his attorney, during his absence from Canada, to collect all rents due and accruing due, and in case of non-payment of the same to sign a warrant of distress in his name to enforce payment of the same, to give receipts for the rents when paid, to receive all moneys coming to him, to endorse all checks and drafts payable to his order, to receive payment of the same, and to manage and act for him during the time aforesaid, in the matters aforesaid, as if he were personally present, and to commence, institute, and prosecute all actions, suits, and other proceedings which might be expedient to be done, instituted, or prosecuted about the premises, as fully as he could do, if personally present.

When the plaintiff left the county he gave the key of the house to a person living on an adjoining lot, with instructions to let or sell the place, and also to give the key to a person named Parkinson, who had bought O'Hare's furniture, when he came to take it away. Parkinson got the key and returned it. Afterwards the key was taken by some one, said to be defendant's son. Defendant said he saw the place with the key in the door, and went in. Afterwards he applied for a lease to young Mr. Greer, who came down, turned the key in the door of the house, (defendant's things were then in the house) and took the key with him. He then gave defendant a lease of the premises, similar in terms to that granted to the plaintiff, dated 29th August, 1866, to hold to defendant for 21 years from the date, at the rent of £3 2s. 6d. per year, in half yearly payments of £1 11s. 3d., payable on the 1st of May and November in each year, with the same form of re-entry on default in payment of rent for forty days.

The lease was executed by John Greer by John Allan Greer, his attorney, opposite a seal, and was signed by defendant as a marksman, opposite a seal. When the lease was executed there were more than two years' rent due and in arrear by the plaintiff. Mr. Greer was absent a little over three months. When he returned (in October or November, 1866), defendant shewed him the lease of 1866. He recognized the act of his son, and defendant paid him the rent since regularly under the lease.

The learned Judge entered a verdict for the plaintiff, with 1s. damages, subject to the opinion of the Court on the law and facts as disclosed in the evidence, the Court to be at liberty to enter a verdict for defendant.

In Easter Term last *Harrison*, Q. C., obtained a rule *nisi* to set aside the verdict and enter a verdict for the defendant, pursuant to the leave reserved.

During the same term *Scott* shewed cause. The only objection to the lease was that it required confirmation: *Bac. Ab. Lease H. p. 764; Burn's Ecc. L. vol. I. p.*

264. The lease is good until re-entry. The lease does not shew any rent in default. The power of attorney did not authorize young Mr. Greer to make an entry on default, or to make a lease. It must be alleged at the time that the entry is made to avoid the lease: *Roberts v. Davey*, 4 B. & Ad. 664; and this is a matter that cannot be made good by subsequent confirmation. Where an agent gives notice to quit without authority, a subsequent confirmation is not sufficient: *Doe dem. Lyster v. Goldwin*, 2 Q. B. 143; *Doe dem. Mann v. Walters*, 10 B. & C. 626.

*Harrison*, Q.C., contra. There was nothing to shew that defendant took the place under the plaintiff. When the lessor returned, he treated the defendant as his tenant, received rent from him, and recognized and approved of all that was done in his name. It is sufficient to say, if you find a person in possession, "Continue my tenant:" *Baylis v. LeGros*, 4 C. B. N. S. 537, 4 Jur. N. S. 513. The lease may be void; and if so, the plaintiff cannot recover: *Doe dem. Brammall v. Collinge*, 7 C. B. 937, 950; *Cripps Law of the Clergy*, 226, 230, 235.

RICHARDS, C. J., delivered the judgment of the Court.

It seems of little practical use to discuss the question whether this lease, having been given by a rector, and for 21 years, is void or not. If it is void, the plaintiff cannot recover, for in his notice of title he claims under that lease; and if it be good, the defendant claims that it has been forfeited by the non-payment of the rent, and so the plaintiff cannot recover.

Without looking much into the matter, I should suppose the lease was binding on the rector who gave it, and on those claiming under him.

The rent was in arrear for a sufficient length of time to warrant the lessor to enter for a forfeiture; and the question is, whether the entry by his agent, and the execution of a lease by him to the defendant, subsequently ratified by the lessor, and affirmed by the receipt of rent ever

since, constitutes a sufficient entry for the forfeiture to put an end to the plaintiff's lease.

The case of *Baylis v. LeGros*, 4 C. B. N. S. 537, referred to by Mr. Harrison on the argument, seems a strong authority for the defendant. The head-note of the case is: "A lessor, finding the demised premises out of repair, intending to take advantage of a clause of forfeiture contained in the lease, entered into an agreement with an undertenant whom he found there, to let them to him as a yearly tenant, and subsequently received rent from him: *Held*, a sufficient re-entry to avoid the lease." In giving judgment, Cockburn, C. J., said: "Finding the premises in a dilapidated state, the landlord comes upon them and enters into an agreement with a man he finds in possession to become his tenant, intending thereby to act upon the forfeiture and oust the lessee. I think that was quite sufficient to constitute an entry by the landlord, so as to put an end to the lease." Williams, J., said: "If Barnewell (the landlord) had entered and desired the person he found upon the premises to go out, and then desired him to resume possession as his tenant, the case would have been clear beyond all doubt. They did not go through that idle ceremony, but the facts set out in the special case shew a re-entry by the landlord and something more." Crowder, J., said: "Then it is said there has been no re-entry. The landlord, however, is in and occupying the premises by a tenant who is paying him rent. I think that is the strongest possible case of entry."

Here the landlord is undoubtedly in by his tenant, and defendant was recognized as his tenant both by confirmation of the acts of his attorney and by receipt of rent under the new lease, probably as early as November, 1866, and this action was not commenced until April, 1868. The authority in the power authorized the attorney to commence, institute, and prosecute all actions, suits, and other proceedings which might be requisite and necessary or expedient to be done, commenced, instituted, or prosecuted in and about the premises, (collecting of the rent). Could he

have authorized ejectment to turn out the tenant for a forfeiture of his lease by non-payment of the rent for forty days? The words seem broad enough, as an act that might have been *expedient to be done*. If so, would the attorney not have the power to enter for the forfeiture and turn out the tenant, or at all events hold possession for the landlord. Without going so far as to hold the power was given to the attorney to enter to avoid the lease, I yet think, under the authority of the case referred to in 4 C. B. N. S., what was done by the attorney and by the landlord after his return home, recognizing defendant as his tenant and receiving the rent from him from time to time as it became due, sufficiently shews a re-entry for condition broken, and the plaintiff's action must fail.

The fact that defendant got into possession by improperly obtaining the key from the party in whose custody it was left by the plaintiff can make no difference. In the case already cited from 4 C. B. N. S., the defendant was a sub-tenant, and was let into possession under the title through which the plaintiff claimed. Nor does the plaintiff in his notice of title claim that the defendant went into possession under him, or went into possession of land in the possession of the plaintiff, but he puts his right to recover on the lease, which the defendant shews was put an end to by the landlord taking possession for a forfeiture.

We think the rule must be made absolute to enter a verdict for the defendant.

*Rule absolute.*

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## TAYLOR V. CROFT.

*Township of Hamilton—Survey under 29 Vic., ch. 72—Effect of.*

The plaintiff owned lot 28 and the defendant lot 27 in the third concession of Hamilton, between which there was no road allowance, and the plaintiff, previous to the survey of that concession made under 29 Vic., ch. 72, had occupied the land in question for more than twenty years. By this survey it belonged to lot 27.

*Held, Morrison, J., dissenting*, that the effect of such survey was to fix conclusively the division line between the lots; but

*Held*, also, that the plaintiff's title by possession was not taken away by it.

EJECTMENT to recover possession of land which the plaintiff claimed as part of lot 28 in the third concession of the township of Hamilton, in the county of Northumberland, and which the defendant claimed as part of lot 27.

A case was stated without pleadings.

It was admitted that the plaintiff had a good paper title to lot 28, and the defendant to lot 27, or to such parts of the lots as are in question, and it was further admitted that the plaintiff and those under whom he claimed had had possession of the land in question, claiming it as part of lot 28, for upwards of twenty years before the survey of E. C. Caddy, hereinafter mentioned.

It was further admitted that the township council of Hamilton, acting under the Act 29 Vic., ch. 72, and within one year after the passing of the Act, 18th September, 1865, passed the following resolutions:—on the 2nd October, 1865, "That the clerk instruct the surveyor, E. C. Caddy, Esq., to proceed with the survey under the Act of Parliament lately passed:"—on the 5th November, 1866, "That an order be granted on the treasurer in favor of E. C. Caddy, Esq., for \$200, on account of special survey;" also, like orders on the 3rd December for \$61.31 and \$600, and on the 14th January, 1867, for \$584.63, being the balance of account for special survey,

It was also admitted that Caddy made a survey of concessions A. and B., and of the first and third concessions of the said township, in accordance with the said Act, and

did all things in accordance with the Act he was required to do: that in making his survey of the third concession, he found two original monuments, one on the east and the other on the west side of lot 27, and from the monument on the west side of the lot he ran a line as a division line between lots 27 and 28. There is no road allowance between the two lots.

A plan was attached to the case, shewing the line he so ran and a dotted line to which the owners of the lots had previously occupied, and according to Caddy's line the land in question belonged to lot 27; it was previously held and occupied as part of lot 28.

For the purposes of this case the dotted line was to be taken as the true boundary between lots 27 and 28, unless the boundary was established by the survey of Caddy and the Act of Parliament.

It also appeared that after the survey Caddy made reports, &c., and filed them in accordance with the fourth section of the Act, and that the Corporation of the Township passed a by-law to levy a rate, &c., under the ninth section of the statute.

The questions for the Court were, whether the survey of Caddy, under the facts stated, made by virtue of the Act, fixed conclusively the division line between lots 27 and 28. If not conclusive, then judgment was to be entered for the plaintiff with costs, and if conclusive, then the further question was, is the plaintiff entitled to recover by right of possession, notwithstanding the provisions of section 3 and the other provisions of said Act; if so entitled the plaintiff was to have judgment, otherwise judgment to be for the defendant, with costs of suit.

The case was argued in Michaelmas Term last.

*J. D. Armour*, Q. C., and *Benson*, for the plaintiffs, contended that the survey by Caddy was not properly directed so as to bind the Municipal Corporation of the Township, being by resolution not by by-law: Consol. Stat. U. C. ch. 54, secs. 187, 189: that the object of the statute was

to fix the true limits of the road allowances mentioned in secs. 2 and 3, and the effect of the survey, if valid, was not to fix conclusively the division line of these lots, between which there was no allowance; but that even if it had that effect, it could not defeat the plaintiff's title by possession which he had acquired to the land in question, to whichever lot it might be held to belong. They cited *Ibson v. The Corporation of Peel*, 19 U. C. R. 174; *London Dock Company v. Sinnott*, 8 E. & B. 347; *Cope v. Thames Haven Dock and R. W. Co.*, 3 Ex. 841; *Diggle v. London and Blackwall R. W. Co.*, 5 Ex. 442; *Ernest v. Nicholls*, 6 H. L. Cas. 401.

*C. S. Patterson*, contra. The survey is valid. The authority to make it is derived not from the municipal corporation, but from the statute. Mr. Caddy could have recovered from the corporation his fees for performing the survey, for the work had been done by him and accepted. The council having paid him by money raised under a by-law for that purpose, and taken possession of the roads, could not object now that the survey was invalid; and if so, neither can third parties. Whatever may be conjectured as to the intention of the Legislature, the words of the Act plainly make his survey conclusive. By sec. 3 he is directed to ascertain the true and correct position of the division lines between the lots, and to mark them by monuments, which shall be taken to be the true boundaries "notwithstanding any occupation or possession thereof, or any part thereof, by any person or persons, any law, usage, or custom to the contrary." The effect of this is to prevent any title by possession from having effect as against the line so established; and sec. 10 tends strongly to the same conclusion.

MORRISON, J.—The statute 29 Vic. ch. 72, is entitled "An Act to establish certain road allowances and highways in the township of Hamilton;" and the preamble recites that the Corporation of Hamilton petitioned to have certain road allowances and highways within the township estab-

lished by law, irrespective of the original survey, and that it is advisable to grant the petition; and by the first section it is enacted, that it shall be lawful for the corporation of the township within one year after the passing of the Act, to direct a survey of concessions A and B, and the first, second, and third concessions of the township, to be made according to law, by E. C. Caddy, &c., for the purpose of ascertaining the true courses and position of such of the allowances for roads in the said concessions, over which the corporation has jurisdiction and control, and of the division lines between the several lots in those concessions. The second section enacts that the several road allowances in said concessions as travelled in January, 1863, and improved by statute labour or otherwise, shall be marked with proper cut stone monuments at the front and rear angles thereof by the said Caddy, and shall thereafter be taken to be and to have been the true and unalterable government allowances and public highways, and shall be marked, if they are not now, one chain in width between the several lots, whether the same are or are not parallel to the governing lines of the several concessions. And by the third section the true position of the allowances for roads in the said concessions not then opened throughout and travelled upon, shall be likewise ascertained and marked by the said Caddy with cut stone monuments placed at the front and rear angles thereof, as also the true and correct position of the division lines between the laid lots; and the same shall thereafter be taken to be and to have been the true and unalterable allowances and lines and boundaries of the said lots, notwithstanding any occupation or possession thereof, or any part thereof, by any person or persons, any law, usage or custom to the contrary; provided always, that the allowance or allowances for roads which are now partly opened, may, if all parties interested consent, be marked and established throughout by the said surveyor (Caddy), in the same course and bearing as the part opened, in which event they shall be taken to be and to have been the true and unalterable allowance or allowances.

These enactments are not very easy to construe with perfect satisfaction, but I think it clear that the Legislature were not proceeding with the design of changing the then boundaries of lots or disturbing the rights of owners of land in those concessions, except in cases where the lines or boundaries of lots were conterminous with any of the road allowances within the purview of the Act. What they had in mind was the establishing and marking the roads mentioned in the second section as travelled in January, 1863, and secondly, the ascertaining and marking the true position of the road allowances which were not then opened throughout and travelled. Such it seems to me to have been the sole object of the statute, and that there was no intention on the part of the Legislature to interfere with private rights or boundaries other than those that might be affected in lands abutting on or bounded by the road allowances.

The second section first enacts that the several road allowances as travelled in January, 1863, shall be marked with proper cut-stone monuments at the front and rear angles thereof, and shall thereafter be taken to be and to have been the true government allowances and highways, and shall be marked, if they were not then, one chain in width between the *several lots*—that is, conterminous with the allowances. In this section nothing is said about ascertaining or determining the position of division lines between any other lots.

The third section, upon which the defendant relies, provides that the true position of the allowances for roads in those concessions which were not then opened throughout and travelled upon, and which includes road allowances between lots as well as the allowances in the concession lines, shall be likewise ascertained and marked with cut-stone monuments placed as aforesaid, viz., at the front and rear angles of the allowances, as also the true and correct position of the division lines between the “said lots.”—What lots? The *several lots* mentioned in the second section between which one chain in width is laid out, as

the road allowance. And the same shall thereafter be taken to be and to have been the true and unalterable allowances and lines and boundaries of the *said* lots, notwithstanding any occupation, &c.

By the second section, the Legislature provided for establishing the road allowances as they were travelled in January, 1863, irrespective of the original survey, giving to those road allowances the usual one chain in width between the several lots bounded by those allowances; and by the fifth section provision was made for adjusting the rights of the land owners by giving to the one the strip between the original line of the road allowance and the newly-established boundary, and giving an indemnity to the opposite and adjoining owner prejudiced by the establishment of such travelled roads: *i. e.*, for the land taken from his lot.

By the third section no such interference with the original allowances therein mentioned was designed, and the surveyor by that section was only authorized to ascertain according to law, and mark the true and correct position of the original allowances and the lines of the lots adjoining, with a proviso that if *all* parties interested consented, these allowances might be marked and established on the same course and bearing as the part opened. This proviso I think also indicates that the intention of the Legislature was only to establish and mark the allowances for roads.

The tenth section, upon which a good deal of stress was placed in the argument, although confusedly and unhappily expressed, sustains, and is in unison with the construction I put on the third section: namely, that "the several allowances for roads and division lines between lots, when the monuments aforesaid shall have been placed as directed by this Act, &c., shall be taken to be and to have been the original boundaries of the lots in each of the said concessions," &c., evidently means that the road allowances and the division lines of the same when the monuments are placed at the front and rear angles of the allowances,

shall be taken to be and to have been the original boundaries of the lots conterminous with the allowances.

To put any other construction on these provisions such as contended for by the defendant, would in my opinion be inconsistent with, and contrary to the whole tenor of the enacting clauses of the Act, its title and preamble.

We cannot infer, without express words, that the Legislature designed to change or make alterations in the boundaries of all the lots in those concessions. It is not probable that in so important a matter it would not have clearly expressed itself, and made provision to meet the results that would arise from any interference with, or alteration in, the existing boundaries, by which the various owners occupied their farms and lands. It is true that there are expressions in the Act wide enough, when taken by themselves, to be construed to apply to other lots than those conterminous with the road allowances; but when the intention of the Legislature can be collected from the statute itself, words may be modified or supplied so as to obviate any inconsistency or repugnancy with such intention. I take it we are not at liberty to assume an intention of an unexpressed purpose by interpreting dubious language to carry that assumed intention into effect, and when the question is, whether existing rights are to be interfered with, if the language of the statute is not clear, a construction destructive of right ought not to be adopted.

On the whole case, I am of opinion that the survey of Caddy does not fix conclusively the division line between the lots in question, and that judgment should be entered for the plaintiff, with costs of suit.

WILSON, J.—I think the statute does fix the true division lines between the different lots, but notwithstanding that, the possession of the parties, which has grown into a title, is not at all affected or defeated by the statute.

It now plainly appears the plaintiff is in possession by this survey of a part of lot 27. But the statute does not take that possession away from him. Under the Boun-

dary Commissioners' Act, when it was in force, the rights of parties were not altered by the settling of the true side or boundary lines of lots; nor under our present Survey Act are such titles affected, though the true boundaries are established.

On this ground I am of opinion the plaintiff is entitled to maintain his possession against the true, actual, and fixed boundary line.

RICHARDS, C. J., concurred with Wilson, J.

*Judgment for plaintiff.*

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MCINNES ET AL V. THE WESTERN ASSURANCE COMPANY.

*C. L. P. A., sec. 167—Agreement to refer—Staying proceedings.*

By a condition of the policy of insurance sued upon, in case differences should arise touching any loss or damage, the Company reserved to itself the power of having the loss or damage submitted to the judgment of arbitrators.

*Held*, that this was an agreement that any differences between the parties should be referred to arbitration, within the C. L. P. A., sec. 167; and that a Judge therefore had power under that section to stay the action on defendants' application.

*C. Robinson*, Q. C., obtained a rule *nisi* to rescind the order of Mr. Justice Gwynne, made on the 7th July last, affirming a previous order of Mr. Dalton, and directing proceedings in this action to be stayed, on the ground that the parties had agreed that any differences between them should be referred to arbitration, under the C. L. P. A. sec. 167.

The action was brought on a policy of insurance upon a stock of dry goods, which contained, among other conditions, the following: "And in case differences shall arise touching any loss or damage, the Company reserves to itself the power of having the loss or damage submitted to the judgment of arbitrators, indifferently chosen in the usual way, who shall, before proceeding with the matter, name a third

arbitrator, and the award in writing of the said arbitrators, or any two of them, shall be binding on the parties; each party to pay one-half the expense of reference and award."

The question was whether this was an agreement within the statute above mentioned.

*E. Martin* shewed cause, and *Robinson*, Q. C., supported the rule.

The facts are more fully stated, and the authorities cited, and arguments of counsel sufficiently appear, in the report of the decision appealed from: *McInnes v. The Western Assurance Co.*, 5. P. R. 242.

RICHARDS, C. J., delivered the judgment of the Court.

The 167th section of our Common Law Procedure Act is similar in its terms to the 11th section of the English Common Law Proceedure Act of 1854. That statute was passed after the case of *Scott v. Avery*, 5 H. L. Cas. 811, S. C. 8 Ex. 487, 497, had been decided. The question how far Courts of justice could be ousted of their jurisdiction by agreements between the parties to refer had been much discussed. The arbitration clause in the policy of insurance in that case was framed by Mr. Justice Cresswell, as stated by Bramwell, B., in *Elliott v. Royal Exchange Assurance Co.*, L. R. 2 Ex. 245. In that case it was held that the arbitration clause provided that the action should not be brought until the amount which the plaintiff was entitled to receive should be first ascertained by the arbitrators.

In *Horton v. Sayer*, 4 H. & N. 649, Martin B. referred to previous decisions and said, "It seems to me that *Scott v. Avery* has over-ruled all the previous decisions on the subject. If the parties choose to arrange that, before any action is brought on a policy of assurance, an arbitrator shall ascertain the sum to be paid, that seems to me only a circuitous mode of saying that no action shall be brought. I am glad to say that by the 11th section of the Common Law Proceedure Act, 1854, if an action is commenced after the parties have agreed to refer any differences to arbitration, the Court or a Judge may stay the proceedings.

That enactment renders our decision in this case of less importance than it otherwise would have been."

In *Elliott v. Royal Exchange Assurance Co.*, L. R. 2 Ex. 240, in argument, when it was contended the agreement to refer did not oust the Court of jurisdiction, it was stated, "The defendants had their true remedy, which was to apply for an order of reference, on the delivery of the declaration, under 17 & 18 Vic. ch. 125, sec. 11."

In *Cooke v. Cooke*, L. R. 4 Eq., at p 87, Lord Hatherly, then Vice Chancellor Wood, referred to a long series of decisions determining that an agreement to refer did not oust the ordinary jurisdiction of the Court of Chancery, and also to the doubts as to how far an agreement might be framed binding on the parties which would compel a reference. After referring to the provisions of the Common Law Procedure Act of 1852, with regard to referring matters to arbitration, he said: "But the case does not rest there; because the Legislature, having the whole subject before it, by the 11th section has enacted that, where there is an agreement to refer, either party if vexed by an action or suit in a Court of law or equity, may apply to that Court to know whether its jurisdiction is or is not properly ousted by the agreement. Thus the Legislature deals with this very subject. It does not take the step of ousting the jurisdiction, and saying it shall be concluded; but it directs an application to be made to the Court, in order that, having the consideration of the whole matter before it, the Court may exercise its own discretion as to whether the suit or action shall proceed."

These *dicta* clearly shew that it was intended that the Court should have the power of staying proceedings in those cases when there was an agreement to refer, and yet the Court would not give effect to such agreement when it was set up by plea to oust them of jurisdiction.

The instrument between these parties is in writing. It contains a provision as to a reference if the Company desires it, and that is one of the conditions, and forms part of the policy. The plaintiffs must be a party to this in-

strument or they could not sue on it. Then, being a party to it by accepting it, and accepting it on the conditions contained therein, they surely agree to the provisions contained therein, and the provision that in case differences shall arise touching any loss or damage, the Company reserves to itself the power of having the loss or damage submitted to the judgment of arbitrators indifferently chosen in the usual way, \* \* \* and the award in writing of the arbitrators, or any two of them, shall be binding on the parties.

In *Braunstein v. The Accidental Death Ins. Co.*, 1 B. & S. 786, the provision with regard to referring the matter to arbitration in case of difference of opinion as to the amount of compensation payable to the plaintiff was contained in the conditions and regulations printed on the back of the policy. Here the Company say the policy is made and *accepted* in reference to the conditions therein contained and thereto annexed, and on the other side of the same there are printed conditions of assurance referred to in the policy, and amongst them this provision as to referring to arbitration in case differences should arise touching any loss or damage.

Mr. Robinson, in his argument, pressed strongly the point that the Company could not be compelled to arbitrate, the arbitration clause was one the right to which they reserved to themselves. I do not see that that can make any difference. The plaintiffs accepted the policy on that condition, and they in effect agreed that when differences arose they should be referred to arbitration, if the Company desired it.

The Company did desire it, and now apply to have the action stayed under the statute. We have not been asked to say if this application under the circumstances is reasonable, but we are to say whether in our judgment a Judge has the power under the statute to stay proceedings in such a case. We think he has. We can see many reasons why, when the question is one purely of damages to a large quantity of goods by fire, smoke, or water, how

the matter may be much more satisfactorily disposed of by reference to parties well acquainted with the value of goods, who can see them and decide as to the *quantum* of damage to each particular piece, rather than the matter should be thrown at large before a jury, with a dozen witnesses on each side, speaking of the damage to a very large number of articles ranging from a spool of thread to a piece of silk velvet.

Referring to the judgments of Mr. Dalton and the Hon. Mr. Justice Gwynne, in this matter, to which I do not feel it necessary to add anything more, we are all of opinion this rule should be discharged with costs.

*Rule discharged.*

THE CORPORATION OF THE COUNTY OF FRONTENAC V.  
THE CORPORATION OF THE CITY OF KINGSTON.

18 Vic. ch. 130—*Jurors' expenses—Right of action for—Retrospective rate.*

The 18 Vic. ch. 130, enacted that any county of which a city formed part for judicial purposes, should be entitled to demand and receive from the city a portion of the expenses incurred by the county for the payment of jurors in any year, to be determined in the manner provided, and that such portion should be payable to the county immediately after the close of each year.

*Held*, on demurrer to the declaration, that an action would lie by the county against the city for its portion of such expenses; and, this being so, that the plaintiffs were entitled to recover a judgment, although as to some of the years, (the claim extending from 1855 to 1869,) the defendants might be unable to enforce payment, because a retrospective rate would be required, which might be a conclusive objection to an application for a mandamus to levy.

*Semble*, that for the sums due for 1868 and 1869, the plaintiff, suing in June, 1870, could enforce his judgment.

*Held*, also, that the effect of the 29-30 Vic. ch. 53, was to abolish the distinction between the mode of assessment in cities and counties, both for the purposes of the Jurors' Act and otherwise.

Remarks by *Wilson, J.*, as to the practice of omitting to levy in each year for the full amount of the sinking fund required for loans, and its effect upon the rights of creditors, taken in connection with the doctrine against rating for debts past due.

DECLARATION—First count.—For that the Legislature of the late Province of Canada, by the 18 Vic. ch. 131,

enacted that the municipal corporation of any county in Upper Canada of which any city should form part, should be entitled to demand and recover from the municipal corporation of any city which should form a part of such county for judicial purposes, a portion of the expenses incurred by such county in any year for the payment of jurors, which portion should be determined as in the said Act provided. And it was therein and thereby declared that the year for the purposes of the Act should be the calendar year, and that the Act should have effect from the 1st of January, 1855, so far as to enable any county to recover under it the proportion above mentioned of money expended for the purposes aforesaid since that day; and that in comparing the value of ratable property in any city or county for the purposes of the said Act, the assessed annual value should be held to be ten per cent. of the actual value; the actual or annual value of ratable property in a city or county for the purposes of the said Act to be that shewn by the assessment rolls of each for the year in which the expenses to be divided between them were incurred, and the proportion of such expenses to be finally borne by the city should be payable to the county immediately after the close of each year; the word county as used in the Act to include a union of counties for judicial purposes. And whereas before and after the passing of the said act, and until as hereinafter in this count mentioned, the counties of Frontenac, Lennox, and Addington, were a union of counties in the late Province of Canada for judicial purposes, of which union the City of Kingston formed a part for judicial purposes. And whereas, in and by the 23 Vic. ch. 39 it was declared that from and after the passing of the said Act the County of Lennõx should be incorporated with the County of Addington, and they should together form one county for all purposes whatever, by the name of the County of Lennox and Addington, which county should be united with the County of Frontenac as the Counties of Lennox and Addington then were, and should form the junior county

of the united Counties of Frontenac, and Lennox, and Addington. And whereas by proclamation under the great seal of the late Province of Canada, dated 30th September, 1864, it was duly declared that from and after the 1st of January, 1865, the union between the County of Lennox and Addington and the County of Frontenac should be and the same was, from the date last mentioned, duly dissolved, the assets hereinafter in this count mentioned becoming by agreement between the corporations the property of the County of Frontenac, the senior county of the said late union. And whereas the expenses incurred by the said late union during the year 1855 for the payment of jurors was a large sum, to wit: \$2,017.60; and during the year 1856 a large sum, to wit, the sum of \$3,818.15; during the year 1857 a large sum, to wit, the sum of \$4,392.60; during the year 1858 a large sum, to wit, the sum of \$3,551.35; during the year 1859 a large sum, to wit, the sum of \$4,017.47; making in the aggregate for said years a large sum, to wit, the sum of \$17,797.17.

And the plaintiffs aver that the portion of such expenses for the payment of jurors for which the City of Kingston was liable to the union under the said Act, ascertained and determined each year as in said Act provided, and comparing the value of ratable property in the city and county as in said Act provided, according to the assessment rolls of each for the year in which the expenses to be divided between them were incurred, was for the year 1855 a large sum, to wit, the sum of \$217; for the year 1856 a large sum, to wit: the sum of \$846, for the year 1857 a large sum, to wit, the sum of \$982; for the year 1858 a large sum, to wit, the sum of \$674; and for the year 1859 a large sum, to wit the sum of \$838; making in the aggregate a large sum, to wit, the sum of \$3,557, which several sums became and were payable to the said union immediately after the close of each of the said years. And the plaintiffs further aver that the defendants have not paid to the said union, or to the plaintiffs, the senior county thereof, the said several sums of money last

mentioned, or any of them, or any part thereof, although duly and annually ascertained, determined and demanded, but have hitherto wholly neglected and refused to pay the same, although the defendants had in each of the said years sufficient money belonging to the city applicable to municipal purposes generally, and held and still hold moneys and property, real and personal, not acquired, required, or used for municipal purposes, more than sufficient to meet the plaintiffs' demand, and although the defendants in each of the said years levied and collected for the purposes of the said demand divers sums of money, out of which they might and ought to have satisfied the plaintiffs' demand. Whereupon, and by force of the statute in this count first mentioned, an action hath accrued to the plaintiffs to demand and recover from the defendants the aggregate amount of the said portion of said jury expenses, ascertained and demanded as aforesaid, being a large sum, to wit, the sum of \$3,557, with interest and costs of this suit.

Second count—That by chapter 31 of the Consol. Stat. U. C., the county of which a city or town withdrawn from the jurisdiction of the county council forms a part for judicial purposes, might demand and recover from the city or town a portion of the expenses incurred by the county in any year for the payment of jurors, determined as in the Act provided, comparing the value of ratable property in the county and city as shewn by the assessment rolls, as in the said Act provided, and the portion to be borne to be payable by the city or town immediately after the close of each year. Then followed the allegation that Frontenac, Lennox, and Addington, were a union of counties for judicial purposes, of which Kingston, withdrawn from the jurisdiction of the county council, formed a part for judicial purposes; and that by 23 Vic. ch. 39, Lennox and Addington were incorporated into one county, and as the junior county it was joined with Frontenac in a union of counties; and that by proclamation of the 30th September, 1864, the two coun-

ties were after the 1st of January, 1865, to be disunited, the assets in this count mentioned becoming by agreement between the counties the property of Frontenac, the senior county; and that the expenses incurred by the union for payment of jurors during the years 1860 to 1864, both being inclusive, each of which years was separately given, amounted to \$22,531 50; and that the portion for which the city was liable to the union for the respective years, (the amount for each year being separately stated), was in all \$4884; and that the several sums became payable to the union immediately after the close of the said years, and that the defendants have not paid to the union or to the plaintiffs &c., as in the first count above set forth.

The third count was substantially like the second, but omitting all mention of Lennox and Addington either as separate counties or as one incorporated county, because the claim was for the year 1865 and 1866, before which time Lennox and Addington had been set off from Frontenac. The claim for these two years against the city was \$2,883.

The fourth count was in respect of the years 1867, 1868, and 1869, and was precisely like the third count, excepting that it alleged that the distinction which before the 1st of January, 1867, existed between actual value in rural municipalities and annual value in cities and towns, should cease to exist, and that under the Assessment Act in counties, cities, towns, townships, and villages, the assessment should be made on actual value, and rates collected at so much in the dollar on the actual value of real and personal property liable to assessment. The claim for these three years, which was stated separately for each year, was, in the aggregate against the city, \$6,035.65.

Common counts were added.

The defendants demurred to the first four counts; the causes stated being, that no right of action is intended to be given in respect of the sums claimed, but only that upon the amount being properly determined and demanded each year, the same is to be paid out of the fund for municipal

purposes, or by a rate levied therefor, and in default of such payment then an assessment may be made at the instance of the county or united counties, which is the only remedy: that it is not alleged that these debts were actually levied, or that the defendants had at the bringing of the action or since said actual debts or any moneys belonging to them and applicable to municipal purposes generally, out of which they could and ought to have paid the same: that except as to the debt in respect of 1869, even if former councils had levied and collected moneys out of which they might and ought to have paid these claims annually, but did not, that does not render the defendants now liable for the same: that except as last aforesaid the claims or debts sued for do not fall within the defendants' ordinary expenditure for this year, as is shewn by the said counts, which do not shew that they are debts which notwithstanding this ought to be paid, and it appears by the counts that they are not debts of that nature.

The defendants demurred also to the said four counts, alleging that each one of them was bad except that part of the fourth count which related to the year 1869, on the following grounds—That no right exists to sue for the said debt except in the year following the year of their accruing due, at all events not unless the identical debts had been actually levied for and collected, and no right exists to sue the defendants after such a lapse of time: and that the claim for interest is not warranted by the statute.

The defendants demurred also to the fourth count on the following grounds:—That the method of determining the city portion of the jury expenses in that count set forth is not the lawful method, the provisions of the said Jurors' Act referred to not being changed or affected, nor the rights and liabilities of cities and counties as to jury expenses, nor the mode of ascertaining the portion thereof to be borne by each altered, by the Assessment Act referred to. If the county had taken all necessary preliminary steps to entitle them to the sums claimed, and they had not been paid in each year, the remedy contemplated by the statute is that

the amount should, if not paid, be raised by assessment, and if the city refused or neglected to assess, the county should have applied each year on default for a mandamus to compel the city to levy a rate to pay the same.

Joinder in these demurrers.

The defendants pleaded two pleas, which were numbered as the 7th and 8th pleas on the paper books, which with the replications to them were severally demurred to, but these pleadings and the arguments upon them are omitted, as the whole of them were afterwards struck out by reason of the judgment on which the two pleas were founded having been set aside as irregular and unauthorized (a).

This case was argued in Michaelmas Term last.

*Harrison*, Q. C., for the plaintiffs (b). The 18 Vic. ch. 130, under which the first count is framed, is still in force: *County of Frontenac v. City of Kingston*, 20 C. P. 49. The first count has, since the argument of the cause which was brought in the Common Pleas, been amended according to the judgment of that Court. The plaintiffs can maintain an action at law for their claim. The words of that Act are, the plaintiff shall be entitled to "demand and recover" the same; and by section 1 the same shall be "repaid" to the plaintiffs. The Jurors' Act, Consol. Stat. U. C. ch. 31, sec. 155, and subsec. 2, are similarly worded. In *Brady v. Bellew*, 6 Ir. L. R. 348, an action was held to lie by reason of the words 'applot and levy' the rates on the inhabitants. He referred also to *Hopkins v. The Mayor of Swansea*, 4 M. & W. 621; S. C. in Error, 8 M. & W. 901. *The County of Middlesex v. The City of London*, 22 U. C. R. 196; *Ward v. Lowndes*, 1 El. & El. 940; *Tilson v. The Warwick Gas Light Co.*, 4 B. & C. 962; *Cane v. Chapman*, 5 A. & E. 647;

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(a) The counsel for the plaintiffs began, there being then cross-demurrers upon the record, which were afterwards removed as above mentioned.

(b) The judgment referred to was recovered in the Common Pleas in Michaelmas Term, 1869, on demurrer, and was in these pleas set up by way of estoppel.

*Carden v. The General Cemetery Co.*, 5 Bing. N. C. 258. It is said that the plaintiffs have not alleged that the defendants did not levy and collect the money out of which they might pay these claims. That is a mistake; the counts do expressly allege that fact, though it was not alleged in the case in the Common Pleas; 18 Vic. ch. 130, sec. 4; Consol. Stat. U. C. ch. 31, sec. 157. Then it is said that although the former council has levied the money, the present council cannot be made to pay it. *Mellish v. The Town Council of Brantford*, 2 C. P. 35; and *Scott v. The Corporation of Peterborough*, 19 U. C. R. 471, do not apply, because the counts allege against the defendants that the rates were yearly and duly levied. As to the objection to the fourth count, the plaintiffs are right after the year 1866, by reason of the 29-30 Vic. ch. 53, in proceeding upon the actual value instead of the previous method under the 18 Vic. ch. 130. The other objections to the fourth count have been already answered.

*Read, Q.C.*, and *Anderson*, contra. The first and second counts are bad. The plaintiffs have no remedy at law; if they are entitled to relief at all it must be in equity. The causes of action in the first count accrued to the three United Counties of Frontenac, Lennox, and Addington; and in the second count to the two United Counties of Frontenac, and Lennox and Addington, then forming one incorporated County; and Frontenac alone cannot sue for either of such claims: *County of Frontenac v. City of Kingston*, 20 C. P., pp. 69, 70. These counts do not allege that the junior counties or junior county therein mentioned assigned their interest in these claims to the plaintiffs as the senior county. It is a material allegation, as a plea traversing that fact was held to be a material traverse: Consol. Stat. U. C. ch. 54, secs. 59, 60. None of the first four counts allege that the defendants have in their hands the specific moneys which they are said to have levied to satisfy these jury charges. The defendants may perhaps be considered as trustees for the plaintiffs, but there is no remedy at law against them: *Pardoe v. Price*, 13 M. & W. 267; S. C. 16 M. & W. 458.

As to the fourth count. Although the Legislature, by the 29-30 Vic. ch. 53, has altered the general mode of rating and assessing, the former mode of doing so for jury purposes under the 18 Vic. ch. 130 and Consol. Stat. U. C. ch. 31, secs. 156-7 has not been altered. This count is therefore objectionable for placing the defendants' liability upon the wrong basis. Under any circumstances the plaintiffs, if they are the proper parties to receive the money, cannot, nevertheless, independently of the other objections, sue at all, because at most they have only a claim on a particular fund, which will not confer on them a general right of suit: *Addison v. The Mayor of Preston*, 12 C. B. 134; *Anonymous*, 6 Mod. 27.

*Harrison*, Q. C., in reply. The declaration shews that it was agreed between the other counties and the plaintiffs that the moneys in question should be the property of the plaintiffs, which is a sufficient allegation that the claims have been duly assigned to the plaintiffs; the plaintiffs need not therefore go into Chancery to perfect their title. The counts also shew that the defendants did make the specific moneys which the plaintiffs demand from them, and that they have such moneys not required for municipal purposes.

WILSON, J., delivered the judgment of the Court.

This case does not come before us in a satisfactory manner, even if the estoppel by judgment be struck out, for if the estoppel cannot for any cause be pleaded, the pendency of another action should be a bar.

A new action, under the circumstances of this case, is not the proper method of determining the sufficiency of the judgment given in the other Court. And if this action be brought because the record was defective in the other Court, and could not have been safely taken to appeal, and because the Court would not allow an amendment, there is still less reason why we should be called on to nullify the discretion which that Court has exercised in declining to aid the plaintiffs.

We might perhaps have allowed the defendants the right of pleading the pendency of the other action.

The question is, whether we should not take the judgment of that Court as determining this case on the merits, whether we approve of it or not.

If we did, that would dispose of the claims for the years 1868 and 1869, which were not sued for in that action, as well as for the previous years.

The present case differs from the former one in some respects. The new allegations in it were made to meet the objections which were taken in the former case. It is now averred that the yearly sums were duly and annually ascertained, and determined and demanded, and that the city had in each of the years a sufficient sum belonging to the city applicable to municipal purposes generally, and that the city held and still hold money and property real and personal, not acquired, required or used for municipal purposes, more than sufficient to meet the plaintiffs' demand; and also that the city levied and collected in each of the said years, for the purposes of the said demand, divers sums of money, out of which they might and ought to have satisfied the plaintiffs' demand.

In the former case it was not determined that an action would not lie for the claim.

Mr. Justice Gwynne was of that opinion. The Chief Justice rested his judgment on the deficiency of the declaration, in not stating that the amount claimed in each year had been, according to the statute, duly ascertained and determined, which was an essential preliminary act before any claim could arise.

The objection just stated has now been cured.

We are obliged therefore to consider and dispose of the case as it is now presented to us.

The first question is, whether an action will lie for the recovery of the demands now made?

By the 18 Vic. ch. 130 it was enacted that it was just and right that cities which, for judicial purposes, formed

part of the counties in which they were situate, should pay a fair proportion of the expenses incurred for the payment of jurors in such counties. The county was then empowered to *demand and recover* from the city a portion of the jury expenses incurred by the county in any year, according to the assessed value of all the ratable property in each: the sum to be borne by the city to be *repaid* by it to the county; and to be *payable* immediately after the close of each year. The assessment rolls to be used were those of the year in which the expenses to be divided between them were incurred.

The city was empowered and required to raise by assessment such money which it required for the purposes of that act, or to pay such sum out of any moneys belonging to the city, and applicable to municipal purposes generally.

The money to be repaid by the city to the county was not payable out of any particular fund. It was not payable out of a special rate to be levied for that purpose: it was payable by such a rate, or out of any moneys belonging to the city, and applicable to municipal purposes generally. This distinguishes the claim here from the claims which were made in some of the cases which were referred to. *Addison v. The Mayor, &c., of Preston*, 12 C. B. 108, 134, is in favor of an action being maintainable.

The words of the statute are, that the sums when ascertained the county may "*demand and recover*" them from the city.

*Demand* includes an action: Co. Lit. 291 b; *Altham's* case, 8 Co. 154 a.

*Recover* means to obtain one's rights by judgment: Co. Lit. 154 a; Jac. Law Dic. 'Recovery.'

The common law mode of obtaining redress for a wrong done by not performing a duty is by action: *Tilson v. The Town of Warwick Gas Light Co.*, 4 B. & C. 962.

And an action is defined to be "*jus prosequendi in*

*judicio quod sibi debetur.*" Co. Lit. 285 a; Bl. Com., Vol. III., p. 116.

I think there is a right in the plaintiffs to recover the money in question by action at law from the defendants, if after the amount is ascertained and determined in each year the county does not immediately pay it.

The statute makes it payable "immediately after the close of each year." The county is not obliged to wait on the city for payment until the money has been raised by rate. The county cannot tell whether the city will raise it by rate or not, and that is a further reason why the county should possess the usual right of enforcing payment by action, if payment be not made at the proper time.

The next question, which was not raised, however, by the parties is, are the plaintiffs entitled to recover for the arrears of those years for which a levy at the time the action was brought could not properly have been made? Is the want of a remedy to enforce payment by a levy an answer to the cause of action, or a reason why a recovery should not be had?

The defendants are by law liable to the demand now made, for the statute expressly made them so. Then why should not the plaintiffs obtain a judgment against them? The objection can only be, because it may be said it can be of no use to the plaintiffs; they will not be able to enforce it; it would be illegal on the part of the defendants if they were to pay it. But the inability to make the judgment productive is no defence to the action, nor any reason why the judgment should not be obtained: *Pallister v. The Mayor, &c., of Gravesend*, 9 C. B. 774; *Payne v. The Mayor, &c., of Brecon*, 3 H. & N. 572; *Hartley v. Mare*, 19 C. B. N. S. 85; *Bush v. Martin*, 2 H. & C. 311; *Hartnall v. The Ryde Commissioners*, 4 B. & S. 366, 367; *Scott v. The Trustees of Union School Section of Burgess and Bathurst*, 19 U. C. R. 28.

If this were a motion for a mandamus on the city to

levy a rate to satisfy the claims now sued for, the argument that the claims were of that nature and standing that they could not be lawfully levied from the present ratepayers would be a conclusive answer. Most of the cases cited were motions of that nature. For the debt claimed would not be and is not the debt of those who are now the ratepayers, any more than the baker's or butcher's bill against the former occupant of a house is the debt of the present occupant.

In *Johnson v. The Trustees of School Section No. 13 in Harwich*, 30 U. C. R. 264, we held that, on a motion for a mandamus to levy a rate to pay the judgment, the Court could enquire into the nature and merits of the judgment.

It is, however, no objection to a by-law valid on its face, that the rate to be levied is in fact to satisfy an old standing debt, or, in other words, is to levy a retrospective rate. The time to object is when the accounts objected to are proposed to be paid: *The King v. Sillifant*, 4 A. & E. 354; *Jones v. Johnson*, 5 Ex. 862.

The plaintiffs are therefore entitled to recover a judgment for the old demand, if there be no valid defence appearing on this record. Whether they will be able to make the fruits of it is a question with which we have nothing to do at the present time.

The fourth count was objected to on the further ground, that the mode of determining the city portion of the debt for the years 1867, 1868, and 1869, as set out in that count, was not the proper way of doing so.

By the 18 Vic. ch. 130, and the Jury Act, the city assessed annual value of the ratable property was for the purposes of these Acts assumed to be ten per cent. of the actual value; that was the mode of equalizing the different methods of assessment which then prevailed in cities and counties. By the 29-30 Vic. ch. 53, the system of assessing and rating in both cities and counties is the same; that has in effect abolished the special provisions of the two statutes before mentioned. There is no longer such a thing as an *annual* value of property in cities taken by

assessment; there is no longer a necessity for making the ten per cent. valuation when the annual value in cities is not now taken; and there is no difficulty in determining the proportion of the two parties under the amended law. It is to take the rolls for the year, according to 18 Vic. ch. 130, "in which the expenses to be divided between them were incurred." This objection to the count fails.

Then as to the claim for the years 1868 and 1869, they require a different consideration from those prior to 1868.

I think that as to the year 1869 there is a plain right of recovering the fruits of a judgment rendered for it, as the action was brought in June, 1870.

I think there is the right of recovering the fruits of a judgment rendered for the claim of 1868 also.

The city might in that year have estimated for the jury expenses of the year, and have assessed for and levied them. That would have been doing it in advance of the time at which the exact amount could have been known. The county could not know the aggregate charge until all the jurors for the year were paid, and until they had deducted from it certain sums, under the 18 Vic. ch. 130, which they could not know either until at or near the close of the year. And it was the *remaining sum* after these deductions were made which was to be divided between the city and the county.

The city was not bound to make the rate in advance, but might wait until the exact amount had been ascertained which they would have to pay as provided for, and that could not be until the end of the year. As soon as the exact amount was ascertained and determined against the city, the county had a right to have it paid at once.

The county could, however, I think, have delayed suing the city until a rate could be levied to discharge the debt. That rate would be made in 1869 for the year's expenses of 1868, and the levy could not well have been made before the end of that year. The collector's roll is not returnable till the 14th of December of the year. The collector might

not have completed his collections by that time. The council might have extended the time to him till the first of April of the following year, which would be 1870.

If, therefore, the county waited until the rate for 1869, including the debts payable in that year, was levied, I should think that no injustice had been done to the city by such a degree of forbearance. And so long as both parties were acting in good faith, and with reasonable promptitude, the one in trying to collect from the real debtors, and the other in trying to make the real debtors pay, the provisions of the statute should not be pressed too strongly against either of them.

This action having been brought in June, 1870, just about two months beyond the time when the roll of 1869 (including, or which should have included, the jury expenses of 1868, and which became a debt of 1869,) was finally returnable, was not too great a delay to prevent the county from enforcing payment of the expenses in question.

The county therefore is entitled to a judgment generally on the demurrer to the fourth count, and in my opinion is entitled to enforce that judgment generally for the recovery had for the years 1868 and 1869.

The doctrine against rating for past due debts may lead to some difficulty yet.

Consider the ordinary course pursued with respect to a loan to a municipal corporation. The council is required to impose a yearly special rate to pay the interest and to form a sinking fund for the redemption of the loan within the time limited. If the interest be regularly paid, and if the sinking fund be yearly provided for, the creditor will be fully secured in the due payment of his loan at its maturity. But if the sinking fund is not annually added to, how is the creditor to be paid when he calls for his money? There is no special fund for him, or it is inadequate to pay him. Is he to lose his demand, or has the council to levy a rate to raise the money, or if that be not done has he the right to bring an action and enforce

payment by seizure of the corporate property, or by having a rate struck through the instrumentality of the Sheriff?

Upon every principle against retrospective rating, the scheme of paying or of raising the money to pay, from the funds of the ratepayers of the period of the maturing of a debt which had been contracted twenty years before then, must be vicious and indefensible.

Is the creditor then to lose his debt? If so, it must be because he has not vigilantly seen year by year that the fund for his ultimate payment has been raised and secured. If his debt were payable by instalments, he would be obliged to prosecute sharply for each one as it became due, otherwise he would be met by the answer that he was too late in his demand, as there was then a different body of ratepayers from that which should properly have paid him. Is he then bound, when his debt has to be funded by instalments, to see that the funding is duly attended to?

These are questions of grave importance, nor are they quite imaginary. It is notorious that many of these corporations do not raise the full original special rate of each debt. If they did, the rates, instead of being \$1 in the £, on the annual value would be very considerably more. The special rates are not raised at all. There is a general rate for interest, and for the payment in full of such debts which fall due within the year, and for which a levy can conveniently be made. But if the debt cannot be paid off the time is extended, or a new loan is made to pay off the old one.

The plaintiffs are not in a position to complain of any great hardship if they fail to get the benefit of their judgment. Their claims fell due year by year, and they should have collected them long before the present time, for the policy of the municipal acts is clearly against a rating to pay debts of such very long standing. The general scheme however of the acts, by the power of borrowing which they confer, and the power to postpone for a very long period the full payment of the loans, is

based upon the principle of making the ratepayers of each year, while the credit is running, pay for the debts of those who were rate-payers ten, twelve, and twenty years before. There is said to be no positive rule of law against the levying of a retrospective rate; it is always a question whether the Act under which the rate is made expressly or impliedly prohibits it: *Harrison v. Stickney*, 2 H. L. Cas. 108; and that principle is affirmed in the following cases, which in other respects have an application to this case: *The King v. The Chapel Wardens of the Township of Haworth*, 12 East 556; *Tawney's case*, 6 Mod. 97, 2 Salk. 531, 1 Holt 579, 2 Ld. Raym. 1009; *Rex v. The Justices of Flintshire*, 5 B. & Ad. 761; *Cortis v. The Kent Water Works Co.*, 7 B. & C. 314; *The King v. The Church Wardens of Dursley*, 5. A. & E. 10; *The Queen v. Read*, 13 Q. B. 524; *Piggott v. Bearblock*, 4 Moo. P. C. 399; *Woods v. Reed*, 2 M. & W. 777; *The King v. Sillifant*, 4 A. & E. 354; *Jones v. Johnson*, 5 Ex. 862; *The King v. The Commissioners of Sewers for the Tower Hamlets*, 1 B. & Ad. 232; *Payne v. Mayor of Brecon*, 3 H. & N. 572; *Attorney-General v. Corporation of Lichfield*, 17 L. J. Ch. 472; *The Guardians of the Poor of Wycombe Union v. The Guardians of the Poor of Eton Union*, 1 H. & N. 687; *Hopkins v. The Mayor of Swansea*, 4 M. & W. 621, affirmed in 8 M. & W. 901.

The result is, that the plaintiffs are entitled to judgment generally on the demurrers to the first, second, third, and fourth counts.

*Judgment for plaintiffs.*

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MCINTOSH V. THE GRAND TRUNK RAILWAY COMPANY OF  
CANADA.*R. W. Co.—Obligation to fence.*

The Canada Company owned land in the Town of Goderich through which defendants' railway ran, and on which, being an open common, the cattle of persons living in the town had for thirty or forty years been accustomed to pasture, though without any express permission. The plaintiff's cow having escaped from this land on to the railway, owing to the want of fences, and been killed by a train: *Held*, that he could not recover, for as against him the defendants were not bound to fence.

THIS was an action brought on the 9th of November, 1868, in the first Division Court of the County of Huron, and by *certiorari* issued on the 5th December of the same year brought into this Court.

The plaintiff declared in the first count, that it was defendants' duty, as the owners of a railway running their engines and carriages thereon, to erect and maintain good and sufficient fences on each side of the line of their railway, and that by reason of their neglect so to do, a certain cow of the plaintiff, which was at the time depasturing and lawfully being in and upon certain land situate in the town of Goderich, and adjoining and abutting on the defendants' railway, and on the land found necessary and taken for the uses of the railway, strayed and escaped out of the adjoining land upon the defendants' railway, and was killed by engines and carriages of defendants, and was thereby lost to the plaintiff.

The second count alleged that it was defendants' duty to erect and maintain fences of the height and strength of an ordinary division fence, yet defendants neglected to erect and maintain on each side of the line of their said railway such fences, and by reason of such neglect a cow of the plaintiff, which was at the time lawfully and with consent of the owner depasturing on a certain common in the town of Goderich, through which the defendants' railway passed, and which was not fenced off from the said railway, strayed therefrom upon the said railway, and was killed by

the engines and carriages of the defendants, and was wholly lost to the plaintiff.

The third count charged defendants with negligence in the management of their engines; but it was not supported by the evidence, and was given up.

The defendants pleaded not guilty by statute, Consol. Stat. C. ch. 66, sec. 83, Public Act.

This cause was tried at the last Spring Assizes at Goderich.

The plaintiff proved that the cow, worth \$40, was killed by defendants' engine when on the track, she having got on the track through defect of fences. The cow was depasturing on unenclosed lands belonging to the Canada Company in the town of Goderich. There were streets laid out through portions of this land, some of which led down to the railway track, and others only went as far as the top of the bank of the River Maitland. This bank was high, and the descent so very abrupt that no vehicles could pass down it, but cows and other animals could get up and down the bank. The place where the dead body of the animal was found was opposite Wellington Street, which it was said only extended to the top of the bank. The evidence shewed that the residents of the town for thirty or forty years past had been in the habit of allowing their cattle to run at large, and that they usually fed over this unenclosed land belonging to the Canada Company, and nothing had been said against their doing so.

The defendants' counsel moved for a nonsuit, on the ground that the cow was not shewn to have been lawfully depasturing on the close adjoining the track, and that as to the third count there was no evidence of negligence in managing the engine to sustain it.

The learned Judge directed the jury to find for the plaintiff on the first and second counts, and assess the damages at \$40, and to find a verdict for the defendants on the third count; and he reserved leave to the defendants to move to enter a verdict for them on the other counts, if the Court should be of opinion the defendants ought to succeed.

In Easter Term last *M. C. Cameron*, Q. C., for defendants, obtained a rule *nisi* to set aside the verdict and enter a nonsuit or verdict for the defendants, pursuant to leave reserved, or for a new trial, the verdict being contrary to law and evidence and the Judge's charge.

During the same term *C. Robinson*, Q. C., shewed cause. The Company are bound, under the 13th section of Consol. Stat. U. C. ch. 66, to erect and maintain fences on each side of the railway of the height and strength of an ordinary division fence. This case does not come within the provisions of sec. 147, declaring that no cattle shall be allowed to run at large on a highway within half a mile of the intersection of such highway with any railway on grade, unless such cattle are in charge of some person to prevent their loitering or stopping at the intersection. Here the streets, on or near which the cow was, do not go down the face of the hill to the railway. The Municipal Act, 29-30 Vic. ch. 51, secs. 354, 355, contemplates that cattle may run at large and that it is the duty of the proprietors of land to fence against them, otherwise the cattle cannot be impounded or a claim sustained for any damages they may commit when the fence is not lawful. The question is, can the plaintiff recover for the value of this cow, which strayed on the defendants' railway track through default of fences from land adjoining such track. The land was owned by the Canada Company, and was not fenced, and the animal having wandered from the highway on to the land was feeding there, and from thence strayed on to the railway track, where she was killed by defendants' engine. If the land had been enclosed by the Canada Company, and the plaintiff had agreed to pay the Company a weekly sum for allowing the cow to depasture on the land, then, under the circumstances shewn, no doubt the plaintiff could recover; or if the Canada Company had granted the plaintiff leave to depasture his cow on the land, and she had been killed by defendants' locomotive, having got on the track through defect of fences, then the plaintiff could recover. It is to be presumed from

the facts shewn at the trial that the plaintiff's cow was on the Canada Company lot with their assent, and in that event the defendants must be liable. The land was unenclosed and had been for thirty or forty years, and the cows of different people about the town had during all that time in the summer season been in the habit of feeding on the grass grown on the land, it being in fact an open common.

The leading case under the English Statute is *Ricketts v. The East and West India Docks, &c., R. W. Co.*, 12 C. B. 160, which decides that the provision as to fencing only creates an obligation to the adjoining proprietor; but the English statute is differently worded from our own, and in terms contemplates an arrangement between the Company and the adjoining proprietors, by which the latter may be freed from the obligation to fence, the proprietor taking it on himself. In *Fawcett v. The York and North Midland R. W. Co.*, 16 Q. B. 610, the Company was bound to erect gates where the railway crossed the highway, and to employ persons to open and shut such gates, so that persons, carts, or carriages passing along should not be exposed to any danger by the passing of engines along the highway. It was held that the plaintiff's horses having strayed from his field into the highway through the gates which were open on the railway, and having been in consequence killed by a train, the defendants were liable; they were bound to keep their gates closed as well against any stray cattle on the road as against cattle travelling thereon. See reference to *Fawcett's* case in *Addison on Torts*, 3rd Ed., 178.

Some of the decided cases in our own courts are adverse to the plaintiff's case, which can only be sustained in view of these decisions on the ground that the cow was on the land of the Canada Company with the permission of the owner. When *Auger v. The Ontario, Simcoe, and Huron R. W. Co.*, 16 U. C. R. 92 was decided, that the Company was not bound by the general Act to fence. *Burton v. The North Eastern R. W. Co.*, L. R. 3 Q. B. 549, only applies to the liability of the railway to its own passengers.

*McLennan v. The Grand Trunk Railway Co.*, 8 C. P. 411; *Studer v. Buffalo and Lake Huron R. W. Co.*, 25 U. C. R. 160; *Wilson v. The Northern R. W. Co.*, 28 U. C. R. 274; *Wallis v. Manchester and Sheffield Railway*, 14 C. B. 214.

*M. C. Cameron*, Q. C., contra. The decided cases in this country shew that the defendants are not liable: *McLennan v. The Grand Trunk R. W. Co.*, is approved in *Wilson v. The Northern R. W. Co.*, and this is the latest decided case on the point. *Fawcett's* case was decided on an enactment which required the company to keep the gates closed to prevent accidents in consequence of persons or animals passing the highway, which was of course for the protection of the public generally. But here the proprietor is the only person who can properly claim damages for the alleged breach of duty, or some one claiming in privity with the proprietor. In this case there is no privity between the owner of the land and the plaintiff. It was an unenclosed space over which the cattle strayed, and defendants were not bound to fence against them.

RICHARDS, C.J., delivered the judgment of the Court.

In *McLennan v. The Grand Trunk R. W. Co.*, the Court of Common Pleas, following *Ricketts'* case, held that under our statute the Company was not bound to maintain and keep up fences along the track except as between them and the owners of the adjoining property. And *Auger v. The Ontario, Simcoe, and Huron R. W. Co.* was to the same effect. This same view is upheld in the late case in this Court of *Wilson v. The Northern R. W. Co.*

We are not prepared to say that this doctrine is wrong, or that railway companies under our statute in this respect owe greater obligations to the general public than at common law. A proprietor in England, who is bound to fence against a neighbouring proprietor, owes no obligation to a third party whose property may be injured by a defect of the fences which the defendants were bound to repair.

Mr. Robinson in his argument wished to distinguish as to the right of the parties to recover against a railway who

had neglected to fence by referring to the former provisions in the Ontario, Simcoe, and Huron Railway Act as to fencing. But after notice was given to the Company the obligation to fence was as great as regarded the liability to an adjoining proprietor as under the general Act.

In *Auger v. The Ontario, &c., R. W. Co.*, 16 U. C. R. 94, Sir John Robinson said, referring to the omission of defendants to fence their track, "But that can only give a right of action where the cattle killed, belonging to the owner of the land, are upon his land, which the Company ought to have fenced off from the railway, or where the owner of the cattle has them on that land *by privity with the owner of the land, that is, with his leave.*" In that case it appeared that the horses escaped from open and unenclosed land adjoining the property of one O'Connell, who had allowed the plaintiff for a trifling reward to let them run there for the season. The land of O'Connell was not merely open to the railway, but was open on all sides so that cattle could come into it and go from it at pleasure from any of the adjoining lands. The learned Chief Justice, after stating that evidence was given to shew that the notice had been given to defendants to fence the land, and that they were bound to fence, adds, "The Company would be liable for the horses of any person being injured by their locomotives, in consequence of the want of a fence, who was in privity with the owner of the land, that is, occupying it by his license. But this land of O'Connell's was open to the whole world; it did not merely lie unenclosed where it was contiguous to the railway, but was altogether open on each side, so that the cattle of any and every person might resort there if they pleased. Under such circumstances \* \* it cannot be said that the plaintiff, because he chose to put his cattle into a field thus lying open, would have any remedy for their loss against the owner of the land, nor can he, in our opinion, be recognized as having any claim against the Company. The fact that the plaintiff agreed to pay a nominal sum for a privilege that others enjoyed for nothing has not the effect, we think, of making

him such an occupier of the land, within the meaning of the Act, as the Company are bound to fence against."

In this case there is no pretence of any express permission to the plaintiff to put his cattle on the land from which they strayed upon the defendants' railway. All that can be said is, that if the obligation to fence gave the right to the owners of all cattle that might run on the unenclosed lands of the Canada Company to require the defendants to fence their lands, because the Canada Company did not forbid every man from allowing his cattle to come on to their unfenced lands, then the right to compel the defendants to erect fences is not confined to the owners or occupiers of land adjacent to that owned by the railway; and I understand that this view is contrary to the decided cases both in this country and in England.

On the whole, we think the rule must be absolute to enter a verdict for the defendants, pursuant to the leave reserved.

*Rule absolute.*

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### MCDOUGALL ET AL. V. SMITH ET AL.

#### *Trespass and trover—Right to set up jus tertii.*

In trespass and trover for saw logs it appeared that they were cut in 1868 by one F., and sold by him to the plaintiffs in 1869. The land on which they were cut had been sold in 1864 by the Crown to R., who made a payment then and took a receipt. In 1866 R. transferred his interest to the defendant, who marked the logs with his mark before they left the land. In March, 1869, defendant obtained a patent for the land, and in April he seized the logs which were in plaintiffs' possession.

*Held*, that the plaintiffs were entitled to recover, for though the logs when cut were the property of the Crown, the plaintiffs were in possession when defendant took them, and defendant being a wrong-doer could not set up the *jus tertii*.

First count, trespass for taking 100 saw logs marked with a particular mark. Second count, trover for the same.

Pleas, not guilty, and logs not the plaintiffs'.

The case was tried at Peterborough, before Galt, J., when the following facts were agreed to :

The logs in question, seventy-six, were taken by the defendants from among a quantity of logs of the plaintiffs in Mud Turtle Lake. The lands on which these seventy-six logs were cut were sold in 1864 by the Crown at public sale, to one Rogers, who made a payment and took a receipt therefor at that time. In 1866, Rogers by deed transferred his interest in the lands to the defendant R. C. Smith. The logs were cut, on or before the 15th November, 1868, by one Fowlds, and before the month of March, 1869, he sold them to the plaintiffs. All the logs were drawn off the lots before March, but the defendants had, previous to their being drawn off, marked them with their mark, and on the 15th April, 1869, defendants took and converted them to their own use. On the 3rd May, 1869, Fowlds paid the trespass dues in respect of the logs to the Crown. In December, 1868, defendant R. C. Smith paid the balance of the purchase money due to the Crown for the lands, and in the month of March, 1869, obtained the patent therefor.

The learned Judge on these facts entered a verdict for the plaintiffs, with leave to the defendants to move to enter a verdict for them.

In Michaelmas term *C. S. Patterson*, in pursuance of the leave, obtained a rule *nisi* to set aside the verdict and to enter a verdict for defendants, or one of them, on the ground that, under the facts admitted, the property in the logs was in the defendants, or one of them.

In Hilary Term *J. K. Kerr* shewed cause. In *Henderson v. McLean*, 8 C. P. 42, it was held that a purchaser from the Crown, holding only a receipt for a portion of the purchase money, could not maintain trespass against a wrongdoer. In *Walker v. Rogers*, 12 C. P. 327, it was held that the 23 Vic. ch. 2, sec. 17, refers only to receipts theretofore granted. *Henderson v. McLean*, 16 U. C. R.

630, refers to and partly dissents from *Henderson v. McLean*, 8 C. P. 42, but it does not affect it as regards this case. It is referred to also in *Walker v. Rogers*, and adhered to by the Chief Justice. Marking the logs was not such an act of ownership as entitled the defendant to any property in them: *Short v. Ruttan*, 12 U. C. R. 79, 85. The plaintiffs being in possession at the time of the trespass, the defendants had to shew a paramount title, which they could not do. He referred also to *Nicholson v. Page*, 27 U. C. R. 318, 505; *Glover v. Walker*, 5 C. P. 478; *Whiting v. Kernahan*, 12 C. P. 59; *Deedes v. Wallace*, 8 C. P. 385.

*C. S. Patterson*, contra. The plaintiffs must shew their title. It is admitted that the timber belonged to the Crown when they obtained it, and that answers their case. They never had any right or title, and were trespassers merely. No doubt, either plaintiffs or defendants, if in actual possession, could have sued the others for taking the timber. If defendants were to bring trespass, they could maintain it; but even if they could not, it does not follow that the plaintiffs can sue, when they shew the title to be in the Crown, and that they have no right, for then the *prima facie* presumption from possession is removed: *McMullen v. Macdonnell*, 27 U. C. R. 360; *Farquharson v. Knight*, 24 U. C. R. 412.

MORRISON, J., delivered the judgment of the Court.

From the facts admitted it is, I think, clear that the defendants had no property in the logs when they were cut, and when they were drawn off the land and sold to the plaintiffs, as it was not until after the logs were taken off that the patent issued to the defendants of the lots from which they were taken, and at the time of the trespass committed the lots were in possession of the plaintiffs, mixed with other logs of theirs in Mud Turtle Lake.

The contention on the part of the plaintiffs was, that at the time of the cutting of the logs and when sold to them

the property of the timber was in the Crown, and that, as the plaintiffs had possession of the logs under the circumstances stated, the defendants had shewn no title or authority to dispossess the plaintiffs of them. It was conceded by Mr. Patterson for the defendants that at the time the logs were cut they belonged to the Crown, but he argued, the fact being so, it was an answer under the second plea to the plaintiffs' title, which was only a *primâ facie* one arising from possession, which the evidence or facts admitted rebutted; but we think that the defendants being themselves wrong-doers they cannot set up the *jus tertii*. What was said by Lord Campbell, C. J., in *Jefferies v. Great Western R. W. Co.*, 5 E. & B. 802, is quite applicable here: "The law is, that a person possessed of goods as his property has a good title as against every stranger, and that one who takes them from him, having no title in himself, is a wrong-doer, and cannot defend himself by shewing that there was title in some third person; for against a wrong-doer possession is a title. The law is so stated by the very learned annotator in note (1) to *Wilbraham v. Snow*, 2 Wms. Saund. 47 f; and I think it a most reasonable law, and essential for the interests of society, that peaceable possession should not be disturbed by wrong-doers. And I do not find that this doctrine has been impeached by any of the cases cited. It is not disputed that the *jus tertii* cannot be set up as a defence to an action of trespass for disturbing the possession." I see no difference in principle between that case and this.

On the whole, we think the rule should be discharged.

*Rule discharged.*

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# A DIGEST

OF

## ALL THE REPORTED CASES

DECIDED IN

# THE COURT OF QUEEN'S BENCH,

FROM EASTER TERM 33 VICTORIA, TO HILARY TERM 34 VICTORIA.

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### ACCOUNT STATED.

The mere calculation of what is due as the balance of a former transaction will not support an action on account stated.—*McKay v. Grinley*, 54.

### ACTION.

*See* JURORS.

### ADMISSION.

*See* MORTGAGE, 1.

### ADVERTISEMENT.

*See* EXECUTION.

### AGENT.

*See* PRINCIPAL AND AGENT.

### AGREEMENT.

*See* CONTRACT.

### ALTERATION.

*Of deed.*—*See* INSOLVENCY, 3.

### APPEAL.

*See* COUNTY COURT, 2.—FENCE VIEWERS.

### ARBITRATION AND AWARD.

*C. L. P. A., sec. 167—Agreement to refer — Staying proceedings.*—By a condition of the policy of insurance sued upon, in case differences should arise touching any loss or damage, the Company reserved to itself the power of having the loss or damage submitted to the judgment of arbitrators.

*Held*, that this was an agreement that any differences between the parties should be referred to arbitration, within the *C. L. P. A., sec. 167*; and that a Judge therefore had power under that section to stay the action on defendants' application.—*McInnes et al. v. The Western Assurance Company*, 580.

*See* FENCE VIEWERS.

### ASSESSMENT.

*See* TAXES—TAXES, SALE OF LANDS FOR.

## ATTORNEY.

*Liability.*]—Where an attorney received money to invest in real estate security, *Held*, that he was liable for the want of reasonable care as regarded the value of the security, and that his responsibility was not confined to the examination of title.—*Peters v. Weller*, 4.

## AWARD.

*See* ARBITRATION AND AWARD.

## BANKRUPTCY.

*See* INSOLVENCY.

## BANKS.

*Bankers—Deposit of check with—Presentment—Dishonour—Liability.*]—The plaintiff having a bank account with defendants' agency at St. Catharines, deposited with them on Saturday morning, about 11.30, a cheque of one C. on another bank in the same place, for \$350, payable to the plaintiff or bearer, and not endorsed. The sum was credited in the plaintiff's pass book as cash, and the cheque stamped with a stamp used by defendants as "The property of the Quebec Bank, St. Catharines." On Monday morning it was presented for payment and dishonoured; but it would have been paid if presented on Saturday before the bank closed, which was about one o'clock. The defendants having charged the amount of the cheque to the plaintiff, he sued them for money had and received and money lent.

*Held*, that he could not recover, for defendants were not guilty of laches; and *semble*, that they could have recovered back the amount

from the plaintiff, even if they had paid it to him.—*Owens v. The Quebec Bank*, 382.

## BILLS OF EXCHANGE AND PROMISSORY NOTES.

1. *Promissory note—Conditional endorsement—Pleading.*]—Where a note not signed by any one was endorsed by defendant, and delivered by him to the plaintiff, upon condition that A. and B. should sign it as makers, and it was signed only by C.: *Held*, that these facts might be shewn by defendant under a plea denying his endorsement.—*Austin v. Farmer et al.*, 10.

2. *Promissory Note—Payable in United States Funds—Pleading.*]—*Held*, that a note made in this province, payable in current funds of the United States of America, was not a promissory note.

The plaintiff having declared upon such note, the defendant pleaded setting it out *in hæc verba*, and alleging that it was made in this province: that the current funds mentioned were paper notes issued by the United States Government, and current there as money, but that the dollar named in them was not equal to the dollar of our money nor of any fixed value; and that except by the indorsement of said notes by defendant, there was no contract between them and the plaintiff. *Held*, that the plea was good, and not objectionable as varying the written contract by parol.—*Bettis v. Weller et al*, 23.

3. *Promissory note—Presentment and notice.*]—In an action by endorsee against endorser of a note, an averment of presentment and

notice is supported by proof of a subsequent promise to pay, although it appears that there was in fact no proper presentment or notice.

So held, in accordance with *Kilby v. Rochussen*, 18 C. B. N. S. 357.—*McCarthy v. Phelps et al.*, 57.

4. *Note payable to A. for the use of B.—Effect of.*—Declaration on a note payable to G. or order. Plea, *non fecit*. The note when produced was payable to G. or order “for the use of M.” Held, no variance, for it was declared on according to its legal effect.

There was also an equitable plea, setting out facts which if true shewed that M. was not entitled to the money, and alleging that the plaintiff, the endorsee of G., took it with notice. Held, that the fact of the note being expressed to be for the use of M. was no evidence of such notice; for this shewed only M.’s right as against G., whereas the plea was in denial of his right.—*Munro v. Cox*, 363.

5. *Note signed in blank—Liability.*—Where the defendant signed as maker a printed form of a promissory note, and handed it to A., by whom it was filled up for \$855, and the plaintiffs afterwards became endorsees of it for value without notice: Held, that the defendant was liable, though it might have been fraudulently or improperly filled up or endorsed.—*McInnes v. Milton*, 489.

See BANKS.—INSOLVENCY, 2.—STAMPS.

## BISHOP.

See CORPORATION, 1.

## BOUNDARY.

See DESCRIPTION OF LAND.—MUNICIPAL CORPORATIONS, 4.—SURVEY.

## BRIDGE.

*River separating townships—Obligation to erect bridges over.*—See MUNICIPAL CORPORATIONS, 5.

## BY-LAW.

*Application to quash—delay.*—See COMMON SCHOOLS, 2.

*Not under seal, application to quash.*—See MUNICIPAL CORPORATIONS, 2.

## CARRIERS.

*Contract to carry—Special conditions — Pleading.*—Declaration upon a contract by defendants to carry goods from St. Mary’s to Hamilton within a reasonable time, alleging non-performance.

*Plea*, that the goods were carried upon certain special conditions, providing, in substance, that goods addressed to points beyond defendants’ railway would be forwarded by public carriers, and defendants’ responsibility should cease on notice to such carriers that the goods were ready for them; and that defendants should not be responsible for any damage or detention after said notice, or beyond their limits, nor for “claims arising from delay or detention of any train, whether in starting, or at any station, or in the course of the journey.” And the defendants alleged that they had no station at Hamilton, and that they conveyed the goods to their nearest station thereto, and handed them over to the Great

Western Railway Company, which conveyed them to Hamilton.

*Replication*, that the plaintiff sues not only for the neglect and delay in the plea alleged, but for unreasonable delay by defendants at St. Mary's, and for neglect to carry from thence to their station nearest to Hamilton.

*Rejoinder*, repeating the conditions set out in the plea, and alleging that defendants only agreed to carry on those conditions.

*Held*, on demurrer, that the rejoinder was bad, for not stating any facts to bring defendants within the conditions; and that the plea was bad for not averring that defendants conveyed the goods to their nearest station to Hamilton, and gave notice to the Great Western Railway Company, within a reasonable time.—*Devlin v. The Grand Trunk Railway of Canada*, 537.

*Receipt for goods, estoppel by.*—  
See ESTOPPEL.

See SHIPPING.

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## CERTIORARI.

See CONVICTION, 1, 2.

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## CHAMPERTY AND MAINTENANCE.

*Agreement.*—The plaintiffs having filed a bill for specific performance of a contract by one R. to sell a certain mine to them, it was agreed between the plaintiffs and T., one of the now defendants, while such suit was pending, that certain persons should purchase said mine from the plaintiffs: that they should deposit the money required for security for costs, which the plaintiffs had been ordered to give in

said suit, and pay all costs incurred or to be incurred therein, or any other suit brought or defended by them respecting said mine, and pay all moneys due for the purchase thereof, and allot to each of the plaintiffs a twentieth share therein, if they should succeed in getting a title through the suit; and that they would settle all claims of Messrs. E. & G. against the plaintiffs.

The plaintiffs having sued defendants on the last mentioned covenant: *Held*, upon demurrer to a plea setting out the transaction, that the agreement was void for champerty and maintenance, and they therefore could not recover.

The plaintiffs replied to the plea on equitable grounds, that in the Chancery suit defendants were added as plaintiffs, and defendants therein in their answer set up against them that this agreement was void for champerty, which they denied, and on the hearing the cause was compromised, and a decree made by agreement by which defendants were allotted a certain portion of the land, for which they received a conveyance, and the agreement declared on was treated and acted upon by all parties and treated by the Court as valid. Remarks by Wilson, J., as to the effect of this replication.—*Carr et al v. Tannahill et al.*, 217.

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## CHANCERY.

*Proceedings in, held a breach of covenant for quiet enjoyment.*—See COVENANT FOR TITLE.  
See CHAMPERTY AND MAINTENANCE.

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## CHEQUE.

See BANKS.

## COMMON SCHOOLS.

1. *School Trustees — Judgment against—Mandamus to levy rate.*—In 1862 the trustees of a school section issued their warrant to J. to levy a rate. One S., who was upon the roll, claimed exemption as belonging to a Roman Catholic Separate School, and in 1863 recovered against J. in replevin for his goods which J. had seized. J. in 1866 sued the trustees of that year for indemnity, and recovered judgment, the action being defended. The trustees issued their warrant to levy a rate including this judgment, and about \$100 was levied and paid over to J., but many of the rate-payers refused to pay the proportion imposed for J.'s claim. J. then, in 1869, having had a *fi. fa.* on his judgment returned no goods, applied for a mandamus to the trustees to levy the balance due to him, none of these trustees having been trustees in 1866.

The application was refused, on the ground that the Court might enquire into the grounds of the judgment, and that the applicant was bound, but had failed, to shew clearly that it was recovered in a justifiable litigation.

*Quære*, however, whether apart from this the application could be granted, for the effect would be to levy a rate on a different body to pay the debt of a previous year.—*In re Johnson and The Trustees of School Section No. 13 in the Township of Harwich*, 264.

2. *By-law to divide a School Section—Notices—Seal—Delay in moving.*—Application to quash a by-law passed on the 14th of August, to divide a School Section, on the ground that it was not under the

seal of the Corporation, and that it did not appear that all parties to be affected had been duly notified of the intended step or alteration.

Upon the affidavits on both sides set out below, the Court were satisfied that the seal had been duly affixed.

As to the notice, the applicant swore he had received no notice of the intention to divide the section or pass the by-law, and believed the Corporation gave none, and this was confirmed by the local Superintendent. On the other hand, it was sworn that the Council in February received petitions, numerous signed, for the division, which they directed to stand over until their next meeting, on the 14th August, and instructed the Clerk to give the necessary notices that such petitions would then be considered, and that such notices had been seen in an hotel, in the post-office, and in the school-house. In reply the Clerk denied receiving such instructions, and a person who had lived at the hotel, and the Postmaster, swore that they had never seen the notices.

The Court refused to quash the by-law, for the affidavits only denied notice of intention to divide the section or pass the by-law, not of the application; the Council had acted upon reasonable assurance that all parties had notice of such application, which no inhabitant of the section had denied knowledge of; and the objections being technical should have been taken promptly, without allowing a term to elapse.—*Taylor and the Corporation of the Township of West Williams*, 337.

3. *Alteration of School Sections—Notice to parties affected—C. S. U.*

*C. ch. 64, sec. 40.*]—Section 40 of the Common School Act, Consol. Stat. U. C. ch. 64, enacts that a township council may alter the boundaries of a School Section, in case it clearly appears that all parties to be affected by the proposed alteration having been duly notified of the intended step or application.

In this case the only notice given was by the trustees of the section from which certain lots were taken by the alteration to the trustees of the section to which such lots were added—that being the notice which it was alleged had been customary in the township in similar cases. *Held*, insufficient, and the by-law making the alteration was quashed.

The by-law was passed in February, 1870, but the clerk of the Corporation did not notify the trustees of it until August—*Held*, that a motion to quash in M. T. 1870 was in time.—*Patterson and the Corporation of the Township of Hope* 484.

4. *School Sections—Boundaries of—Construction of By-law—Map.*]—The question being whether the plaintiff's lot, 23 in the 8th concession of Thurlow, was within school section 16, a by-law defining the limits of sections in the township was proved, which declared the section to be composed, among other lots, of "50 acres of the east side of lot No. 16, all of No. 17, S.  $\frac{1}{2}$  of No. 18, all of 19, 20, 21, 22, 23, and 24," (not giving the concession), "excepting such portion of last mentioned lots as included in sections 18 and 19." Sections 18, by the same by-law, was made to comprise parts of lots 16, 18, 20, 21, and 22, in the 8th concession; and section 19 the N.  $\frac{1}{2}$  of 24 in the same concession.

*Held*, that the whole by-law taken together sufficiently shewed the plaintiff's lot to be in section 16.

*Held*, also, that the map prepared by the Township Clerk, under section 49 of the School Act, C. S. U. C., ch. 64, shewing the division of the township into sections, was admissible as evidence.—*The Chief Superintendent of Education for Upper Canada (now Ontario), Appellant; in re Shorey, Plaintiff, and Thrasher et al., Defendants*, 504.

See LIMITATIONS, STATUTE OF, 2.

## CONSTITUTIONAL LAW.

*Powers of Dominion and Local Legislatures.*]—See TAVERN AND SHOP LICENSES, 2.

## CONTRACT.

1. *Certificate of engineer—Separation of counties.*]—The plaintiff entered into a contract under seal with the United Counties of Huron and Bruce, to construct a gravel road in Bruce, according to plans and specifications annexed, payments to be made monthly on the estimate of the engineer in charge, who was to determine the amount or quality of work to be paid for under the contract, and to decide all disputes relating to the execution of the contract, and his decision was to be final.

*Held*, that the plaintiff could not recover for work done under this contract without a certificate of the engineer.—*Ekens v. The Corporation of the County of Bruce*, 48.

2. *Fire—Injury caused by—Liability of defendant.*]—One M. agreed to burn and clear off the timber on

defendant's fallow at a certain price per acre. While the work was in progress, the defendant, who lived on the place, came occasionally to see how it was getting on, and advised him to set fire to the log heaps. M. told defendant that a brush fence, which extended to the corner of plaintiff's land, might take fire; but defendant said it would make no difference. M. then fired the heaps, and went home. two or three miles off, intending to return in a few days, when the heaps should be ready for branding. During his absence the fire spread to the plaintiff's land, and burned his fences, &c. The jury having found for the plaintiff on the charge of negligence.

*Held*, that M., upon the evidence, was not an independent contractor, over whom defendant had no control, but rather a workman in his employment, and subject to his directions; and that defendant was responsible.

*Quære*, per Wilson, J., whether if M. had been such contractor, the defendant would have been liable. — *Johnston v. Hastie*, 232.

*Liability of Corporation on contract not under Seal.* — See CORPORATIONS, 2.

See CHAMPERTY AND MAINTENANCE. — ESTOPPEL. — MORTGAGE — SHIPPING. — STATUTE OF FRAUDS. — WORK AND LABOUR.

## CONVERSION OF GOODS.

See TROVER.

## CONVICTION.

1. *Certainty — Objections to certiorari — Practice.* — A conviction, for that one H., on, &c., "did keep his bar-room open, and allow

parties to frequent and remain in the same, contrary to law;" *Held*, clearly bad, as shewing no offence.

A conviction, for that the said H. "did sell wine, beer, and other spirituous or fermented liquors, to wit, one glass of whiskey, contrary to law:" *Held*, bad, for uncertainty, as not shewing whether the offence was for selling without a license or during illegal hours.

The charge in a conviction must be certain, and so stated as to be pleadable in the event of a second prosecution for the same offence.

In shewing cause to the rule *nisi* to quash the conviction, it was objected that the recognizance was irregular, being dated before the conviction; but *Held*, that this was ground only for a motion to quash the *certiorari*, or the allowance of it. — *Regina v. Hoggard*, 152.

2. *Affirmed on appeal — Certiorari improperly issued — Practice.* — Where a conviction which had been affirmed on appeal to the sessions was brought up by *certiorari*, contrary to the 32-33 Vic., ch. 3, sec. 71, as amended by 33 Vic., ch. 27, sec. 2, which enacts that in such case no *certiorari* shall issue:

*Held*, that the Court could not quash the conviction (the case being one in which the magistrate had jurisdiction), though it was clearly bad, and no motion had been made to quash the *certiorari*. — *Regina v. Johnson et al.*, 423.

3. 32-33 Vic. ch. 28, D. — *Form of conviction under — Certiorari — Practice.* — A conviction under 32-33 Vic. ch. 28, D., for that V. L. was in the night time of the 24th February, 1870, a common pros-

stitute, wandering in the public streets of the City of Ottawa, and not giving a satisfactory account of herself, contrary to this statute: *Held*, bad, for not shewing sufficiently that she was asked, before or at the time of being taken, to give an account of herself, and did not do so satisfactorily.

*Semble*, proceedings having been taken under 29-30 Vic. ch. 45, D., that the evidence might be looked at; and if so it was plainly insufficient, in not shewing that the place in which she was found was within the statute, or that she was a common prostitute.

The conviction having been brought up by *certiorari*, when, under the 32-33 Vic. ch. 31, D., no such writ could issue—Per *Richards*, C. J., and *Morrison*, J., it could not be quashed, but the Court could only discharge the defendant. *Semble*, Per *Wilson*, J., that being before the Court it might be quashed.—*Regina v. Levecque*, 509.

See MUNICIPAL CORPORATIONS, 4.  
—TOLLS.

### CORONER.

*Coroner's Inquest — Medical witnesses — Fees of.*]—Where a coroner, under C. S. U. C, ch. 125, summoned a second medical practitioner as a witness at an inquest, and to perform a *post mortem* examination, but it was not shewn that such practitioner had been named in writing and his attendance required by a majority of the jury-men, as provided for by sec. 9, a *mandamus* to the coroner, to make his order on the county treasurer for the fees of such witness, under sec. 10, was refused.

*Semble*, that on application for such *mandamus* the county treasurer, as well as the coroner, must be called upon.—*In re Harbottle and Wilson*, 314.

### CORPORATIONS.

1. *Power to borrow*—8 Vic. ch. 82.]—*Held*, that the Roman Catholic Bishop of Sandwich, incorporated by 8 Vic., ch. 82, as “The Roman Catholic Episcopal Corporation of the Diocese of Sandwich in Canada,” had no power to borrow so as to bind his successor; and therefore that the plaintiff, having lent money to such Bishop, which was used in the construction of the episcopal residence and for the purposes of the Church, and taken security for repayment under the corporate seal, was not entitled to recover against the corporation.

The Bishop was described in the instrument as “R. C. Bishop of Sandwich.” *Held*, that this variance from the corporate name was immaterial.—*Ruitz v. The Roman Catholic Episcopal Corporation of the Diocese of Sandwich*, 269.

2. *Contract not under seal — Liability.*]—The defendants wished to dredge their harbour, and the plaintiff had a dredge, then in the State of New York, which, after negotiations with the chairman of the committee on harbour and town property, he offered to lend to the corporation on certain terms, one of which was, that the corporation should pay the cost of its transport to Belleville. The committee reported and recommended this offer to the council, and it was adopted, and the chairman then told the plaintiff to bring the dredge to Belleville, which he did, at a cost

of \$373. The committee afterwards decided to let out the dredging by contract to another person.

*Held*, that the corporation were liable to the plaintiff for the cost of bringing the dredge, although there was no contract under seal.—*Brown v. The Corporation of the Town of Belleville*, 373.

See COMMON SCHOOLS, 1.

## COUNTY COURT.

1. *Jurisdiction — Law Reform Act, 1868.*]—Where a County Court cause is entered for trial at the Assizes under the Law Reform Act of 1868, the jurisdiction is the same only as if it had been tried in the County Court. In such a case, therefore, where the title to land came in question, and a verdict was entered for defendant: *Held*, that the proceedings were *coram non judice*, and the verdict was set aside.—*Wetherall v. Garlow et al*, 1.

2. *Appeal from—Bond—Condition.*]—Declaration on a bond, conditioned to abide by the decision of the C. P. in a County Court suit of W. v. M., appealed to that Court, and to pay all moneys and costs, as well of the suit as of the appeal. Breach, nonpayment of all sums of money, and costs awarded and taxed to W. in the suit: that he recovered judgment in the County Court against M. for \$220 damages and \$72 costs, which defendant had not paid. Plea, that no decision of the said cause was ever made by the C. P., nor any money or costs awarded or taxed by that court to the plaintiff.

*Held*, plea good, for the condition was only to abide by the decision of the C. P., and if the appeal

was not heard and the refusal to entertain it was a decision of that court, it should have been so alleged.

The plaintiff replied, that the sums of \$270 and \$72 were, within the true intent and meaning of the condition, awarded and taxed to plaintiff as and for his moneys and costs which M., within such intent and meaning, was liable to pay. *Held* bad, as tendering an issue on matter of law.—*Waddell v. McColl et al.*, 260.

## COVENANT.

See COVENANT FOR TITLE.—MORTGAGE.—PLEADING.

## COVENANT FOR TITLE.

*Covenant for quiet enjoyment—Breach—Proceedings in Chancery.*]—Declaration, that defendant by deed conveyed land to one T. in fee, covenanting that he should peaceably and quietly enjoy, without the let, suit, &c., of defendants or any person: that T. conveyed to the plaintiffs, who entered into possession; and afterwards a bill in Chancery was filed against plaintiffs and defendants, and it was decreed in the suit that defendants had no right to convey, being trustees only, and the plaintiffs were ordered to convey the land and give up possession thereof, and of their deeds, to two trustees named, whereby the plaintiffs had lost the land, and been compelled to pay costs of the suit, &c.

*Held*, that a good cause of action was shewn: that it was unnecessary to allege an eviction; and that the proceedings in Chancery constituted a breach of the covenant.

One defendant pleaded that since action the plaintiffs had conveyed the land to C. and M.; and the other, that the plaintiffs had so conveyed in pursuance of the decree, C. and M. being the trustees appointed thereby. *Held*, clearly no defence.—*The Trust and Loan Company of Upper Canada v. Covert et al.* 239.

### COVENANT TO STAND SEIZED.

See DEED.

### CRIMINAL LAW.

See CONVICTION.—TAVERN AND SHOP LICENSES.

### CROWN TIMBER.

See JUS TERTII, 2.

### DEED.

*Construction—Reservation of life-estate.*—H., by deed poll, in consideration of natural love and affection and of 5s., conveyed land to her daughter, R., in fee, adding after the *habendum*, “Reserving, nevertheless, to my own use, benefit and behoof, the occupation, rents, issues, and profits of the said above granted premises for and during the term of my natural life.

*Held*, that this reservation was not void, but that the deed might be construed as a covenant to stand seised of the reversion to the use of R., the life estate remaining in H.—*Hartman v. Fleming et al.*, 209.

*Alteration of.*—See INSOLVENCY, 3.

See DESCRIPTION OF LAND.—MORTGAGE.

### DESCRIPTION OF LAND.

1. *Wrong course rejected.*—A description of land in a deed, after running to a point two chains from a line with the east side of the Port Colborne Guard Lock, proceeded “thence south half a degree east 25 chains, more or less, always at a distance of two chains from a line with the east side of said Guard Lock, to the northern limit of said lot 27,” thence, &c. The course should have been north instead of south, and the effect of it as written was to go away from the northern limit of the lot and exclude the land in question.

*Held*, that the course might be rejected, and a line two chains from the east side of the lock be adopted as the course to be taken in order to reach the northern limit of the lot.—*The Corporation of the County of Welland v. The Buffalo & Lak Huron Railway Company*, 147.

2. *Survey—Change of plan—Inconsistent descriptions—Admissibility of descriptions to explain patents.*—One R. in 1829 first surveyed part of the Township of Plympton fronting on Lake Huron, and his plan returned shewed the lots fronting on the lake with an oblique line in rear, following the general course of the lake, but no allowance for road. Afterwards a plan of the whole township was compiled in the Crown Lands Office, from surveys of three separate portions of it made by different surveyors. The descriptions of the lots were made from this plan, all the lots having been granted after it had been completed, and the distances in the descriptions contained in the deeds were according to the scale on which the plan was compiled.

This plan shewed a road in rear of the front lots, and made their depth greater than in R.'s plan. There was no proof of any work on the ground shewing that R. had ever run out or posted the rear line as it appeared on his plan.

*Held*, that it was competent for the government to make such allowance for road, not being inconsistent with any work on the ground.

*Held*, also, that in order to give effect to the change made by such allowance—to avoid an irregular rear boundary for such front lots—and to reconcile the plans, and the grants for one of the front lots and two gore lots in rear of it, which could not all three be carried out owing to a deficiency in the land—a proportionate reduction should be made in each of such lots.

The description of a lot by metes and bounds, from the Crown Lands Department, is admissible in evidence to explain the patent for the lot, in which it is described only by the number and concession.—*Hagarty v. Britton*, 321.

See COMMON SCHOOLS, 4—MUNICIPAL CORPORATIONS, 4.

## DETINUE.

See SALE OF GOODS.

## DISTRESS.

See TAXES, 1.

## DIVISION COURTS.

*C. S. U. C. ch. 19, sec. 175,—Construction of.]—Held*, following *Jones v. Williams*, 4 H. & N. 706, that under the Division Courts Act, *C. S. U. C. ch. 19, sec. 175*, the

Court has no power to stay proceedings in an action brought after the adjudication by the County Court Judge. — *Schamehorn v. Traske*, 543.

## EJECTMENT.

*Ejectment against a mere trespasser—Notice under C. S. U. C. ch. 27, sec. 17.]—The plaintiffs in ejectment, executors and trustees of S., claimed title by a sale under execution against C. It appeared that the patent for the land issued to one Y., of the Township of Fredericksburgh, in 1810. There was no deed proved from Y., but in 1834 one D., of the same township, conveyed to C. the whole lot, and it was shewn that the patent had been in D.'s possession, and in that of C., whose papers had been burned. No claim had been made by or under Y., but no possession had been taken of the land until 1847, when the lot was sold for taxes and purchased by C., who paid the taxes and exercised acts of ownership until the defendant entered as a trespasser.*

*Held*, a case within secs. 17 and 18 of the Ejectment Act, *C. S. U. C., ch. 27*: that the plaintiff, under sec. 18, was a person entitled in justice to be regarded as the proprietor of the land, but unable to shew a perfect legal title from a cause not within his power to remedy by due diligence; and that the defendant, being a mere intruder and stranger to the title, and having received a notice to shew what legal right he had, under sec. 17, was not at liberty to take objections to the plaintiffs' title.—*Davis et al. v. VanNorman*, 437.

*Against Railway Company.]—See RAILWAY COMPANY, 2.*

## EQUITY OF REDEMPTION.

*Sale of, under Execution.*—See EXECUTION.

## ESTATE.

*Deed in fee, reservation of life estate, construction of.*—See DEED.

## ESTOPPEL.

*R. W. Co.—Receipt for goods—Estoppel by—Liability.*—Action for not delivering goods received by defendants to carry for the plaintiff from Montreal to Guelph. Plea, that defendants delivered all they received. It appeared that the goods in question, 2,330 bars and 20 bundles of iron, said to weigh over 39 tons, came by ship from Glasgow to Montreal, the bill of lading being endorsed to K., the plaintiff's correspondent there: K. directed D., a forwarding agent, to forward it to Guelph, and D. received from the agents of the ship an order to the captain to deliver the iron to him, describing it only by the number of bars and bundles, which he handed to one S., the cartage agent of defendants, with the duplicate bill of lading. A few days afterwards, S., as agent for the defendants, gave him a receipt for the iron, described as 2,330 bars, less 34 short, and 20 bundles, and specifying the weight, to be sent by defendants' railway to the plaintiff. At the top of this receipt was a printed notice: "Rates and weights entered on receipts or shipping bills will not be acknowledged."

All the iron received from the ship by S. was delivered to the plaintiff at Guelph, the number of bars and bundles being right, but

the weight fell short by about 24,000 lbs.

*Held*, without reference to the notice on the receipt, that the defendants were not estopped by the mention of the weight in such receipt, and that having delivered all the iron they received from the ship they were not liable in this action: *Richards, C. J.*, doubting.

*Quere*, as to the effect of the notice.—*Horsman v. The Grand Trunk R. W. Co.*, 130.

See CHAMPERTY AND MAINTENANCE—INSOLVENCY, 3.

## EVIDENCE.

*Comparison of writings—C. L. P. A., sec. 213.*—Action upon a note. Plea, *non fecit*. The plaintiff put in a bond admitted to have been signed by defendant, and called no witnesses, contending that the jury might compare the two writings, and find their verdict thereon. *Galt, J.*, at the trial held that this could not be done, and nonsuited the plaintiff. *Per Morrison, J.*, the nonsuit was right. *Per Wilson, J.*, it was wrong.—*King v. King*, 26.

*Admissibility of description of lots from Crown Lands Department.*—See DESCRIPTION OF LAND, 2.

*Of re-entry to avoid lease.*—See LANDLORD AND TENANT.

*Of entry by owner to prevent possession from running.*—See LIMITATIONS, STATUTE OF, 2.

*Of joint liability in trespass or trover.*—See TRESPASS.

See EJECTMENT—INSOLVENCY, 4—PRINCIPAL AND AGENT—STAMPS—STATUTE OF FRAUDS—TROVER—WILL—WORK AND LABOUR.

## EXECUTION.

*Sale of land under execution—Defects in process—Sale of equity of redemption—Certificate of discharge of mortgage.*—The defendant in ejectment claiming through a Sheriff's sale under execution, it appeared that a *fi. fa.* lands issued 6th September, 1866, and was returned 17th October, 1867, lands on hand for \$1 and no lands for the residue; but nothing had been done and no lands advertised under it. On the same day a *ven. ex.* and *fi. fa.* residue was delivered to the Sheriff, who advertised as if under the original writ and sold the lands in question on the 2nd May, 1868. There was a mortgage upon it, which defendant, the purchaser, paid off on the same day, and took a certificate of discharge in the usual form, stating that the mortgagor had paid the money due; not such a certificate as is provided for by the C. L. P. A. sec. 258, on sale under execution of a mortgagor's interest.

*Held*, that the sale could not be supported, for the original writ had expired with nothing done under it, and the *ven. ex.* and *fi. fa.* residue had not been a year in the Sheriff's hands before the sale; and moreover he had assumed to act under the original *fi. fa.* and the *ven. ex.*, not the *fi. fa.* residue.

*Semble*, that the want of proper advertisements would not have avoided the sale.

*Semble* also, that the taking the certificate of discharge as stated could not defeat the purchaser's title by vesting the mortgagee's estate in the mortgagor, but that it would enure to the benefit of such

purchaser as the mortgagor's assignee.—*Lee v. Howes et al*, 292.

See EXTENT, WRIT OF.

## EXTENT (WRIT OF).

*Practice*—31 Vic. ch. 10, D.]—A writ of extent was set aside by Judge's order, and it was ordered that another writ might issue upon the fiat for and tested as of the date of the former writ. *Held*, that such order was unobjectionable.

*Held* also, that the affidavit, set out below, upon which the writ issued, was sufficient, and that the defendant was sufficiently shewn by it to be a debtor to the Crown.

*Held* also, that the Post Office Act 1867, 31 Vic. ch. 10, sec. 89, D., does not take away from the Crown the remedy by extent upon a bond given by a postmaster.—*Regina v. McNabb*, 479.

## FENCES.

*Obligation of railways to fence.*]—See RAILWAYS, 3.

## FENCE-VIEWERS.

*Award—Right of Appeal—C.S. U.C., ch. 57, 32 Vic. ch. 46 O.*]—The right of appeal to the Judge of the County Court against an award of fence-viewers, under 32 Vic., ch. 46, sec. 8, is not restricted to an award made under sec. 6, sub-sec. 2 of the Act, when the land benefited is in two municipalities, but extends to an award made by three fence-viewers under C. S. U. C., ch. 57, which the later Act amends and is made part of.—*In re McDonald et al. and Cattnach et al.*, 432.

## FI. FA.

See EXECUTION.

## FIRE.

*Injury caused by, Action for.*—

See CONTRACT, 2.

See RAILWAYS, 1.

## FIXTURES.

See INSURANCE, 4.

## FORFEITURE.

See LANDLORD AND TENANT.

## FRAUD.

See INFANT.

## FRAUDS, STATUTE OF.

See STATUTE OF FRAUDS.

## HAMILTON.

*Township of.*—See SURVEY.

## HANDWRITING.

*Proof by comparison.*—See EVIDENCE.

## HIDES.

1. *Sale of hides — Inspector's weights to govern—Inspector's fees—Commission.*—Upon a sale of hides by weight, of specified qualities according to inspection, *i.e.*, “cured and inspected No. 1 hides,” &c. *Held*, that the weight as ascertained and marked by the inspector, under 27–28 Vic. ch. 21 and 29–30 Vic. ch. 24, was binding upon the parties, in the absence of any thing in the agreement to the contrary.

*Held*, also, that the seller must pay the Inspector's fees, the agreement not providing otherwise.—*Macklem et al. v. Thorne et al.*, 464.

2. *Inspection of raw hides*—27–28 Vic. ch. 21; 29–30 Vic. ch. 24; 33 Vic. ch. 37.]—The defendant bought hides, some of which had been produced within and some without the County of Middlesex, but all without the City of London. Some were purchased by him in, and some out of, the county, but none within the city; and they were brought by him into the city, placed in his tannery there, and manufactured into leather.

The plaintiff was an inspector of raw hides and leather, appointed under 27–28 Vic. ch. 21, 29–30 Vic. ch. 24, and 33 Vic. ch. 37, for the city and county, having a place of inspection within the city, but not elsewhere.

*Held*, 1. That his compulsory powers extended only to the city, but that his limits of inspection might extend to the area assigned to him as the district in which the city was situate, although his acting therein would be optional with him; and he might, in his discretion, go also into any part of the Province not within another inspector's limits.

2. That all raw hides or green raw hides produced within a city or town for which there is an inspector must be inspected before being sold there: that if produced and sold without such city or town, they are exempt from inspection until brought within it; and the purchaser there must have them inspected before selling or disposing of them in any way whatever.

3. That the tanning or using the hides in his own business was not a "disposing of them in any way whatever," within the statute, 29-30 Vic. ch. 24, sec. 1. *Wilson, J.*, dissenting.

The defendant therefore was held not liable to the penalty for not having these hides inspected.—*Oli-ver qui tam v. Hyman*, 517.

## HIGHWAY.

*Right of government to make allowance for after survey.*—See DESCRIPTION OF LAND, 2.

See MUNICIPAL CORPORATIONS, 4, 5.—TOLLS.

## ILLEGALITY.

See CHAMPERTY AND MAINTENANCE.—INFANT.

## INFANT.

*Right to avoid agreement.*—Declaration on defendant's covenant to pay off a mortgage to one L., on land conveyed by him to the plaintiff, alleging non-payment, and a sale of the land under the mortgage to one M., who evicted the plaintiff.

Plea, on equitable grounds, that before the mortgage fell due defendant, at the plaintiff's request, advanced to him the money required to pay it off, which the plaintiff promised and gave his bond to the defendant to do: that afterwards the plaintiff, owing defendant \$400, gave him a mortgage therefor upon the same land: that when the mortgage to L. fell due, the plaintiff being unable to pay it off according to his bond, it was agreed by all parties that L. should sell one-half of the land for more

than her mortgage, and pay the plaintiff the surplus, and release to the plaintiff the other half: that L. accordingly sold half the land to M., and released the other half to the plaintiff by deed, in which the defendant joined, which deed the plaintiff accepted, and L. also paid to the plaintiff the balance of the purchase money received for the other half above L.'s mortgage.

Replication, that the plaintiff, when all these transactions took place, was an infant, by reason whereof his alleged bond and mortgage were voidable, and he has avoided the same.

*Held*, that the replication was good, for that there was nothing alleged in the plea to which the plaintiff was prevented from setting up his infancy as an answer, and he might avoid the bond and mortgage whenever they were relied upon against him.—*Gallagher v. Gallagher*, 415.

## INQUEST.

See CORONER.

## INSOLVENCY.

1. *Insolvent Act of 1869*—*Notice of action to assignee—Mortgagee of goods, rights of under section 50.*—An Official Assignee in Insolvency sued for trespass in taking and selling goods, is not entitled to notice of action.

So held in accordance with the cases deciding that a Sheriff is not entitled to such notice; but *Wilson, J.*, but for these decisions would have thought otherwise.

The defendant pleaded (relying upon the 50th section of the Insolvent Act of 1869), that before the

writ of attachment hereinafter mentioned, one C. mortgaged the goods to the plaintiff: that while said goods were in C.'s possession, the mortgage providing that he should retain them until default, the Sheriff seized the goods under an attachment in Insolvency issued at the suit of one M., and placed them in the custody of defendant, being an official assignee and guardian, and defendant being afterwards duly made assignee of C.'s estate, sold the goods, which are the alleged trespasses. *Held* a bad plea, for only negating a default by C. when the attachment issued, not when defendant received and sold the goods.

*Seemle*, that the section referred to only restrains a suit by creditors who have proved, or can prove, on the estate, and does not prevent a mortgagee from suing in trespass for a wrongful taking of the goods. — *Archibald v. Haldan*, 30.

2. *Claim against a firm, and one partner separately.*] — The appellants in the matter of C. & Co., insolvents, had a claim upon a note made by C. & Co., payable to C., one of the firm, and by him endorsed to the appellants. They proved against the firm on the 3rd July, 1869, but afterwards withdrew it, and proved on the 11th January, 1870, under sec. 60 of the Act of 1869, specifying and putting a value on the separate liability of C.

*Held*, affirming the decision of the County Judge, that the appellants, under the Act of 1864, could not rank both upon the separate estate of C. and on the estate of the firm, but must elect; but that they might prove against the joint estate for their whole claim, without de-

ducting from it the value of C.'s separate liability.

*Held*, also, that the appellants could treat the payee and endorser as having incurred a separate liability by his indorsement, distinct from his joint liability as a maker.

*Held*, also, that the Act of 1869 could not apply, for the case was pending before it, and the question in dispute as to the right to prove was not a matter of procedure only, exempted from the exceptions in the repealing clause. — *In re Chaffey et al., Appellants, and Davidson et al., Respondents*, 64.

3. *Insolvent Act of 1864—Deed of composition and discharge—Execution by insolvents, &c*] — G. & Co. having made an assignment on the 4th of July, 1868, a deed of composition and discharge, dated 8th August, was filed on the 14th September, 1868, not being then signed by the insolvents. It was confirmed by the County Judge on the 2nd December, 1868, but the confirmation was reversed in this Court in March following, on the ground that the insolvents had not executed it. Afterwards, in the same month, the insolvents executed the deed, without any previous leave from the Judge, and without re-filing it; and they then set it up as a defence to this action previously brought on a note.

*Held*, that the plaintiff, a non-assenting creditor, was not bound by this deed, for the evidence (set out in the case) shewed that the members of the insolvent firm had individual creditors, and it provided only for partnership debts.

Per *Richards*, C. J. — The deed was invalid also, because not properly executed by the insolvents.

Per *Wilson, J.*—Such execution was not an alteration of the deed, for the insolvents being named in and parties to the deed were only perfecting, not altering, it by executing; but the deposit of such deed with and notice thereof by the assignee, under sec. 9, sub-sec. 2 of the Act of 1864, were necessary after the execution by the insolvents, and for want of this it was ineffectual.

*Held*, also, that it was no objection that some of the assenting creditors had executed in the name of their firms and by procuration, and that no power of attorney was proved, for they had accepted the composition under it.

*Held*, also, that the plaintiff was not prevented, by having proved his claim before the assignee, from going on with this action.

*Held*, also, that the plaintiff having so proved, and having obtained an order in this Court to set aside the Insolvents' discharge in the Insolvent Court, with costs to be paid to him out of their estate, was precluded from objecting that the assignee was not duly appointed.—*Allan v. Garratt and Williamson*, 165.

4. *Property sold by insolvent as plaintiff's agent—Right of assignee to proceeds—Evidence.*—The plaintiff purchased barley from R. telling him to consign it to C. and draw on C. for the purchase money. C. was to keep the barley as plaintiff's agent until the plaintiff directed him to sell, the plaintiff paying him such a sum as he might require by way of margin to protect himself against a fall in price. C., to reimburse his advance on R.'s draft, obtained a discount from the bank

on his own note secured by the warehouse receipt for the barley, which he transferred to the bank. While C. held the barley the plaintiff paid to him \$540 as margin, to hold it. The barley was shipped by plaintiff's instructions to Oswego, to the order of the bank, where it was sold; and the bank received the proceeds on the 2nd December, having previously had notice that the plaintiff owned the barley. About the 17th November C. left the country, and an attachment in insolvency having issued against him, an interpleader was directed to try whether the balance of such proceeds above the bank's advances belonged to his assignee or to the plaintiff:

*Held*, that the plaintiff was entitled to it, for the barley was his, and the money, the proceeds of its sale, never came into C.'s hands, or was mixed with his general assets.

C. had advanced by paying R.'s draft more than the proceeds of the barley, and it was contended therefore that there was no surplus available for the plaintiff; but *Held*, that the plaintiff was entitled to deduct from such advance the sums paid by way of margin.

After C. had absconded the plaintiff went to his office to ask about his barley, and there saw R., the manager of C.'s business, who went with him to the Bank and had a conversation with the cashier: *Held*, that their evidence of what passed was clearly admissible.—*Cotter v. Mason, Assignee*, 181.

5. *Personal actions—Rights of assignee.*—The plaintiff, having held the defendant in the suit to bail, recovered a verdict for slander, for enticing away and detaining his

wife, and for assaulting her. Before recovering judgment he made an assignment under the Insolvent Act, and he then sued the bail on their recognizance, not having yet obtained his final discharge. The defendants set up the rights of the assignee. *Held*, on demurrer, that the plaintiff was entitled to recover, for the causes of action being for purely personal wrongs did not pass to the assignee.

*Semble*, also, that the proceeds of the suit when recovered could not be claimed by the assignee, and that he therefore could not in any way interfere with the suit.—*White v. Elliott and Mooney*, 253.

## INSPECTION OF HIDES.

*See HIDES.*

## INSURANCE.

1. *Mutual Insurance Co.—Mortgage—Assignment of policy*—"Person insured"—*Proof of loss*.]—The plaintiff, owning property, insured it with a mutual insurance company on the 1st December, 1864, for three years. He mortgaged it to one N., and on the 13th May, 1865, assigned to him the policy. N. paid up all arrears of assessments, but gave no note or security for the amount unpaid. The defendants assented to the assignment on the 13th December following. The property was burned on the 2nd July, 1867. The notice of loss was given and the requisite affidavits made by N. His mortgage was paid off in 1868, and in March following the plaintiff sued on the policy. One of the conditions endorsed was, that all persons insured and sustaining loss should forthwith give notice, and within thirty days

deliver a particular account of such loss, signed by them and verified by their oath.

*Held*, that the action could not be maintained. Per *Morrison, J.*, N. was not the person insured, and therefore could not give the notice of loss. Per *Wilson, J.*, he was insured, and could have sued in his own name, but the contract of insurance having been absolutely transferred to him, the plaintiff could not sue.—*Fitzgerald v. The Gore District Mutual Fire Insurance Co.*, 97.

2. *Assignment of policy—Evidence of assent by company—Second insurance—Proof of notice*.]—In an action on a fire policy issued to the plaintiff, the declaration alleged an assignment of the policy and of the property insured to one M., and by M. to B. and P., with the assent of defendants, before the loss, and that the plaintiff sued as trustee for B. and P. The second plea denied the assignment to B. and P. and defendants' assent thereto. The third plea set out a condition that notice of any other insurance should be given, so that a memorandum thereof might be endorsed on the policy, otherwise the policy should be void; and alleged another insurance effected by B. & P., without notice given or endorsed. To this the plaintiff replied that notice of such insurance was duly given to defendants.

As to the second plea, it appeared that the assignment to M. had been assented to by A., a sub-agent at Oil Springs of P., the defendants' agent at Sarnia (defendants' head office being at Montreal); and a memorandum was also endorsed by P. that the loss, if any, should be paid to M. only. A. had effected

the insurance with the plaintiff, and he swore that he was aware of the intended assignment by M. to B. & P., and drew it out, after speaking of it to C., defendants' inspector, who told him to use the same form as in the assignment to M.: that B. & P. purchased the property, which was then kept by the plaintiff as a temperance house, it being part of the bargain that the policy should be assigned, though the assignment was not completed for some months after the conveyance of the property. B. & P. opened a bar, for which an extra premium was charged by the company, and paid through A. to P. and by P. to the head office.

*Held, Morrison, J.*, dissenting, that there was evidence of assent by the defendants to the assignment to B. & P., so as to sustain a verdict for the plaintiff on this plea.

As to the third plea, another insurance was proved, effected by B. & P., after the assignment to them, with another company. There was contradictory evidence as to whether any notice of this was given, but it was, at all events, only a verbal notice given to P., defendants' agent at Sarnia, and not endorsed on the policy, which was not produced at the time. *Held, Richards, C. J.*, dissenting, that this could not support the plea, for such a notice should have been given to the company, or to some officer who had power to act upon it by cancelling the policy, which P. was not shewn to have had.—*Hendrickson v. the Queen Insurance Co.*, 108.

3. *Insurance on grain—Condition—Construction—Other insurance not notified—Warehouse receipts—Owners.*—Where a policy was made

subject to the conditions endorsed thereon, one of which was "Insurance subsisting or effected with other Companies must be notified to the Board, and if approved of to be indor-ed on the policy and signed by the Secretary." *Held*, that this was a condition precedent, and non-compliance with it a bar to the action, though it did not so expressly provide.

The defendants having proved their plea under this condition, the plaintiff contended that it did not bar the action. Leave was reserved to move for a nonsuit on this ground, and the plaintiff had a verdict, there being another issue on the record. *Semble*, that a verdict should have been entered for defendants on the plea, and the plaintiff left to move for judgment *non obstante*, for that there cannot be a nonsuit while another issue stands in favour of the plaintiff on the record.

Another condition provided that property must be insured in the names of the owners. It appeared that the policy was on grain insured in the name of the plaintiff, who had given warehouse receipts for it, endorsed to certain banks. *Per Wilson, J.*—Such banks were the owners, by virtue of these receipts, not the plaintiff, and the condition was broken.—*McBride v. The Gore District Mutual Fire Insurance Co.*, 451.

#### 4. *Statement of title—Possession.*

—The plaintiff had lived with his father for about 37 years, on land belonging to the Crown. A barn had been built on it, resting upon abutments of loose stones, which the plaintiff in October, 1867, insured with defendants. In December, 1867, a patent issued to

one F., and in June, 1869, T., claiming through the patentee, recovered judgment in ejectment against the plaintiff and his father, and placed a *hab. fac.* in the Sheriff's hands. A few days after, and before it had been executed, the barn was burned. Proceedings in Chancery were then pending by the plaintiff contesting the claim of T. The policy required that the plaintiff in his account of the loss should shew the true nature of his title at the time of the fire; and the plaintiff in such account stated that he was *bonâ fide* owner, and that his title was by possession for thirty years by himself and his father.

*Held*, that the account did not give a true statement of the plaintiff's title; that the barn was part of the freehold; and that he could not recover.

*Wilson, J.*, dissenting, on the grounds that the plaintiff being in possession, and prosecuting his claim in equity, had an insurable interest: that as against an adverse claimant he might treat the barn as a chattel, which he could remove, and in this view his statement of title was correct.—*Sherboneau v. The Beaver Mutual Fire Insurance Association*, 472.

See ARBITRATION AND AWARD,

### INVESTMENT.

*Liability of attorney receiving money to invest.*—See ATTORNEY.

### JURORS.

18 Vic. ch. 130—*Jurors' expenses*—*Right of action for—Retrospective rate.*—The 18 Vic. ch. 130, enacted that any county of which a city formed part for judicial purposes, should be entitled to demand and

receive from the city a portion of the expenses incurred by the county for the payment of jurors in any year, to be determined in the manner provided, and that such portion should be payable to the county immediately after the close of each year.

*Held*, on demurrer to the declaration, that an action would lie by the county against the city for its portion of such expenses; and, this being so, that the plaintiffs were entitled to recover a judgment, although as to some of the years, (the claim extending from 1855 to 1869,) the defendants might be unable to enforce payment, because a retrospective rate would be required, which might be a conclusive objection to an application for a mandamus to levy.

*Semble*, that for the sums due for 1868 and 1869, the plaintiff, suing in June, 1870, could enforce his judgment.—*The Corporation of the County of Frontenac v. The Corporation of the City of Kingston*, 584.

See TAXES, 2.

### JUS TERTII.

*Trespass to goods — Sheriff.*—[In trespass for taking goods it appeared that the goods came to the plaintiffs' warehouse at Windsor consigned to one P., and were seized there by defendant under a writ of replevin sued out against P. by one H.; P. asserted that he had bought the goods from H., which H. denied, and the Judge before whom the case was tried, without a jury, found that the goods belonged to H. *Held*, that the defendant, not being a mere wrongdoer, was at liberty to dispute the plaintiffs' title and set up the

title of H., under a plea of not possessed, and that he was therefore entitled to a verdict on the finding. —*Great Western Railway Company v. McEwan*, 559.

2. *Trespass and trover—Right to set up jus tertii.*]—In trespass and trover for saw logs it appeared that they were cut in 1868 by one F., and sold by him to the plaintiffs in 1869. The land on which they were cut had been sold in 1864 by the Crown to R., who made a payment then and took a receipt. In 1866 R. transferred his interest to the defendant, who marked the logs with his mark before they left the land. In March, 1869, defendant obtained a patent for the land, and in April he seized the logs, which were in plaintiffs' possession.

*Held*, that the plaintiffs were entitled to recover, for though the logs when cut were the property of the Crown, the plaintiffs were in possession when defendant took them, and defendant being a wrong-doer could not set up the *jus tertii*.—*McDougall et al v. Smith et al*, 607.

## LANDLORD AND TENANT.

*Lease—Forfeiture—Re-entry.*]—One G., a rector, in 1861, leased land to the plaintiff for 21 years, at an annual rent, with a proviso for re-entry on non-payment. The plaintiff entered and paid rent until the summer of 1865, when he went away from the country, leaving nearly a year's rent over due, and giving the key to a person in the adjoining house. In July, 1866, the premises being then vacant, G. went to England, leaving a power of attorney with his son, authorizing him to collect and distrain for

his rents, and to commence and prosecute all actions and other proceedings which might be expedient to be done or prosecuted about the premises as fully as if he were present. Defendant in some way got the key and went in, and afterwards obtained a lease from G.'s son for 21 years. G. on his return in 1866 recognized this lease, and received rent under it regularly from defendant until 1868, when the plaintiff brought ejectment, claiming under his lease from G.

*Held*, that the facts shewed a sufficient re-entry by G. to avoid the plaintiff's lease, and that the plaintiff therefore could not recover.

*Quære*, whether the son was authorized, under the power of attorney, to bring ejectment and enter for the forfeiture.

*Semble*, that the lease to the plaintiff was binding on the Rector and those claiming under him until forfeited.—*O' Hare v. McCormick*, 567.

## LAW REFORM ACT, 1868.

*Jurisdiction in County Court causes tried at Assizes.*]—See COUNTY COURT, 1.

## LEASE.

See LANDLORD AND TENANT.

## LEATHER.

*Inspection of Hides.*]—See HIDES.

## LEGISLATURE.

*Powers of Dominion and Local Legislatures.*]—See TAVERN AND SHOP LICENSES, 2.

## LICENSE.

*Conviction for selling liquor without, form of.*—See CONVICTION, 1—TAVERN AND SHOP LICENSES.

## LIMITATIONS—STATUTE OF.

1. *Ejectment*—In ejectment, it appeared that B., the patentee, agreed to sell the land, in 1837, to A. R., giving him a bond for a deed. A. R. took possession, and died on the land in 1839. His widow then went to Scotland, and in 1840 his brother, P. R., came out and took possession, with the knowledge of B., to whom he paid the balance of the purchase money. In 1842, his mother, with her grandchild, the daughter of A. R., came out and lived with P. R. until 1850, when he sold out to his mother, who remained until her death in 1854, and devised it to her daughter, who died, leaving the defendant, her husband, in possession. The plaintiffs claimed under the heir of the patentee, and under the heirs of A. R.

*Held*, that they were barred by possession; for as to the patentee, he had been out of possession since 1840, when P. R. entered with his knowledge; and as to the heirs of A. R., he, A. R. had never the legal estate, and there was no proof that P. R. had entered under them or recognized their right.

There was some evidence of an offer by defendant to purchase the plaintiffs' claim; but *held*, that this could avail only if defendant had no title, not to defeat a good title.—*McGregor et al. v. LaRush*, 299.

2. *Ejectment—Entry.*—One G., owning land, allowed a school-house to be built upon it, in 1840, by the neighbours; and a school was kept there until 1851, when a new site was obtained, and the trustees sold the old house. Before doing so, however, they sent for G., to get his consent; and he came to the house, and said the purchaser might live in it until the land was cleared up around it. In ejectment against defendant claiming under the purchaser—

*Held*, that there was evidence of an entry by G., in 1851, from which time only possession would run; and that the plaintiff, therefore, was not barred.—*Henderson v. Harris et al.*, 360.

See RAILWAYS, 1.

## LOAN.

*Power of Corporation to borrow.*—See CORPORATIONS, 1.

## MAINTENANCE.

See CHAMPERTY AND MAINTENANCE.

## MANDAMUS.

*To School Trustees to levy rate.*—See COMMON SCHOOLS, 1.

See CORONER.—JURORS.

## MAP.

*Admissibility of as evidence.*—See COMMON SCHOOLS, 4.

## MARKET.

See MUNICIPAL CORPORATIONS, 3.

## MEDICAL WITNESS.

*Fees of, at inquest.*—See CORONER.

## MEMORANDA.

*Gentlemen called to the Bar, 359, 549.*

## MISJOINDER.

See TRESPASS.

## MORTGAGE.

1. *Construction — Description of parties.*—In a mortgage for \$103, purporting to be made in pursuance of the Act respecting Short Forms of Mortgages, between A. and B., described only as the parties of the first and second parts, the grant of the land was by "the said mortgagor unto the said mortgagee," and the parties were afterwards described throughout as "mortgagor" and "mortgagee," the covenant for payment being, "the said mortgagor covenants with the said mortgagee that the mortgagor will pay," &c. In the margin was this receipt: "Received, on the date hereof, from the said mortgagee, the sum of \$103, being the full consideration money herein mentioned," signed by the party of the first part. The mortgage was executed by A. only. It was objected, in an action against A. on the covenant to pay, that there was nothing in the deed to shew who was covenantor and who covenantee; but

*Held*, that by referring in the receipt for the date and sum received to the mortgage, the defendant had made the receipt part of the mort-

gage, and it clearly shewed him to be the mortgagor; or, if this were not so, that the possession of the deed by the plaintiff, delivered to him by defendant, and the acknowledgment in the receipt, shewed the plaintiff to be the mortgagee.

An admission of the execution of the mortgage was held clearly to include the signature to the receipt, and the receipt of the money as there stated.—*McDonald v. Clarke*, 307.

2. *Construction — Principal due on default in interest — Declaration.*—In a mortgage made according to the Act respecting Short Forms of Mortgages, the proviso was that it should be void on payment of \$1558, with interest at seven per cent. after maturity until paid, as follows (specifying four instalments making up the \$1558, and the days of payment) with interest on each instalment after it should mature, at the rate aforesaid, until payment. There was also a proviso, that on default of payment of the interest, the principal should become payable. The plaintiff sued when one instalment had fallen due, alleging in his declaration that defendant covenanted that he would pay the principal money and interest and observe the proviso for payment, but that he did not pay the same nor observe the proviso.

*Held*, 1. That looking at the form of the mortgage and the declaration, the plaintiff was not entitled to a verdict for the whole principal, for the declaration did not clearly shew that he was claiming it by reason of non-payment of the interest, and he was not bound to sue for the whole amount.

2. That the provisoes and covenants were not deprived of the

meaning given to them by the Act, merely because they were not numbered as in the schedule to it.

*Quære*, there being no day named for payment of the interest, when would there be a default so as to make the whole principal due.—*Northey v. Trumenhiser*, 426.

See EXECUTION.—INSOLVENCY.

## MUNICIPAL CORPORATIONS.

1. *Separation of Counties.*]—The plaintiff entered into a contract under seal with the United Counties of Huron and Bruce to construct a gravel road in Bruce. The counties were separated on the 1st January, 1867, and the plaintiff afterwards sued the County of Bruce alone for work done in making the road, *Held*, that the action should have been against the United Counties.—*Elkins v. The Corporation of the County of Bruce*, 48.

2. *Application to quash—Absence of seal.*]—On application to quash a by-law passed on the 21st December, 1869, under the Temperance Act of 1864, to prohibit the sale of intoxicating liquors, and submitted to the electors on the 2nd February, 1870, it appeared that no seal had been attached to the by-law until after the 2nd March, 1870.

*Held*, that it was no by-law, and therefore could not be quashed; but the rule to quash it was discharged without costs.—*In re Mot-tashed and the Corporation of the County of Prince Edward*, 74.

3. *Regulations of markets—Sale of meat.*]—A by-law of a town for the regulation of the market enacted,

1. That only butchers and persons occupying shops or stalls in the market, or in two specified wards of the town, for the sale of fresh meat, should sell, or expose for sale, in any less quantity than by the quarter: that such butchers and persons might so sell at these places, but not otherwise; and that no person should sell any fresh meat in the town except in the market stalls or such place as the council should appoint, not less than 400 yards from the market, and within certain specified limits in the two said wards.—*Held*, valid.

2. That no person should buy, sell, or offer for sale, any game, fish, poultry, eggs, butter, cheese, grain, vegetables, or fruits, exposed for sale or marketed in the town, until the seller had paid the market fees, or obtained a ticket from the collector of market tolls, as provided in a by-law referred to, and before a specified hour of the day; that no person should forestall, re-grate, or monopolize any of the articles mentioned, within the town; and that before noon no butchers' meat, fish, hay, or straw, should be bought or sold in the town except at the market and in the shops or stalls in the two said wards. *Held*, valid under the powers given by the Municipal Act of 1866, sec. 296, sub-sec. 9, and sub-sec. 10 as amended by 33 Vic., ch. 26, sec. 6, O, and sub-sec. 11.

3. That before 10 A.M. no huckster or runner within the municipality, or within one mile of its limits, should purchase any meats, fish, or fruit brought to the public market. *Held*, bad, as not confined to those living within the municipality or a mile therefrom; and *Quære*, whether it should not ex-

clude persons buying for their own use, not to resell.

4. That every person selling meat or articles of provision by retail, whether by weight, count, or measure, should provide himself with scales, weights, and measures, but no spring balance, spring scale, spring steelyards, or spring weighing machine, should be used for any market purpose. *Held*, valid, under sub-sec. 10 above mentioned, and Consol. Stat. U. C., ch. 58.

5. That persons offending against the by-law should, on conviction by a magistrate, be fined not less than \$1 nor more than \$20, and in default of payment be imprisoned for not less than two nor more than twenty days, which fines should be applied to the uses of the municipality. *Held*, that leaving the fine in the magistrate's discretion was clearly authorized by sec. 209; but that it was invalid for not awarding a moiety of the fine to the informer, under sec. 211.

*Held*, also, that market regulations made by the council might be quashed, as orders or resolutions, under sec. 198.

By these regulations it was provided that any person wishing to sell fresh meat in quantities less than a quarter in a shop or stall in either of the two wards above mentioned, should apply to the market committee, stating the annual sum above \$40 which he was willing to pay for a certificate authorizing him to sell for a year. *Held*, bad, both by the general law, and as opposed to sec. 220 of the Act of 1866. It was also provided that persons obtaining certificates should give a bond with sureties to obey the by-laws relative to the sale of fresh meat at stalls and shops where

it was sold. *Held*, good, for that it applied of course only to valid by-laws.—*Snell and the Corporation of the town of Belleville*, 81.

4. *Municipalities divided by a river—Limits of each—Conviction for passing toll-gate.*—The limits of the city of London were defined by the proclamation setting it apart as all the lands comprised within the old and new surveys of the town of London, together with the lands adjoining thereto lying between the said surveys and the river Thames, producing the northern boundary line of the new survey until it intersects the north branch, and the eastern boundary line until it intersects the east branch of the river:

*Held*, that the city limits extended to the middle of the river; and that a conviction by county magistrates for passing the toll-gate on the city side of the river was therefore bad, as the offence was out of their jurisdiction.

Where two properties or municipalities are divided by a river or highway, the limit of each is, *primâ facie*, the centre of the river or road.—*In re McDonough*, 288.

5. *River separating townships—Obligation to erect bridges over—Municipal Act, 1866, sec. 341, sub-sec. 12, construction of.*—The Grand River forms the boundary, for about eleven miles, between the townships of Seneca and Oneida, in the county of Haldimand. At the village of Indiana, on the Seneca side, a bridge had been first erected in 1850, by a private individual, which was carried away by the spring freshets and ice. Two bridges afterwards built there by joint stock companies had been also

carried away, the last in 1868. A ratepayer of Oneida then applied for a mandamus to the county council, under the Municipal Act of 1866, sec. 341, sub-sec. 12, to compel them to erect a bridge there, which was opposed on affidavits, shewing that there were other bridges at different points, and that the erection of a bridge there would be very expensive, and not in the interest of the county at large.

The application was refused, for 1. The bridge having been built by a joint stock company, the public could not be bound to repair it: and at all events, the obligation being at least very doubtful, the parties should be left to their remedy by indictment; and 2. The place at which such bridges should be erected must be in the discretion of the Council.

*Quære*, whether sec. 341, sub-sec. 12, applies where the river only separates two townships in the same county, but does not form a county boundary.—*Kinnear and the Corporation of the County of Haldimand*, 398.

6. *Rates — Sinking Fund.*] — Remarks by *Wilson, J.*, as to the practice of omitting to levy in each year for the full amount of the sinking fund required for loans, and its effect upon the rights of creditors, taken in connection with the doctrine against rating for debts past due.—*The Corporation of Frontenac v. The Corporation of Kingston*, 584.

*Jurors' expenses as between City and County.*]—See JURORS.

See CORPORATIONS, 2 — FENCE VIEWERS—TAXES, 2—TAXES, SALE OF LAND FOR, 1, 2.

## NEGLIGENCE.

*Injury caused by fire.*—See CONTRACT, 2.

See CARRIERS.—RAILWAYS, 1.

## NEW TRIAL.

*Trespass Verdict against several defendants when not all liable—New trial granted.*]—See TRESPASS.

## NON-SUIT.

See INSURANCE, 3.

## NOTICE OF ACTION.

See INSOLVENCY, 1.

## OBSTRUCTION OF SIDE-WALK.

See VELOCIPEDÉ.

## OFFER TO PURCHASE.

See LIMITATIONS STATUTE OF, 1.

## PARLIAMENT.

*Powers of Dominion and Local Legislatures.*]—See TAVERN AND SHOP LICENSES, 2.

## PARTNERSHIP.

See INSOLVENCY, 2.

## PLEADING.

Declaration that the defendant, by deed, covenanted (not saying with the plaintiff) to pay to the plaintiff, &c. *Held*, good on demurrer.—*Hennessy v. Hennessy*, 38.

See BILLS OF EXCHANGE AND PROMISSORY NOTES, 1, 2—CARRIERS—

COUNTY COURT, 2—MORTGAGE, 2  
—REPLEVIN—SEDUCTION.

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### POSSESSION.

See LIMITATIONS, STATUTE OF.

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### POST OFFICE.

See EXTENT.

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### POWER OF ATTORNEY.

See LANDLORD AND TENANT.

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### PRINCIPAL AND AGENT.

*Held*, that upon the evidence, set out in the case, the defendants were acting as principals, not as agents for the plaintiffs, the purchasers, and therefore could not charge commission.—*Macklem et al. v. Thorne et al*, 464.

See SALE OF GOODS.

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### PROMISSORY NOTES.

See BILLS OF EXCHANGE AND PROMISSORY NOTES.

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### PROSTITUTE.

See CONVICTION.

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### RAILWAYS.

1. *C. S. C. ch. 66, sec. 83—Construction of—Injury by fire.*—The plaintiff sued defendants for having negligently allowed dry wood and leaves to accumulate on their track, which became ignited by their engine, and extended to plaintiff's land, destroying his trees, &c. *Held*, that this was an injury sustained "by reason of the railway," within sec. 83 of Consol. Stat. C., ch. 66, and that the plaintiff, suing

more than six months after such injury, was therefore barred.—*McCallum v. Grand Trunk R. W. Co.*, 122. [Since affirmed on appeal.]

2. *Right to maintain ejectment against—Description of land.*—The defendants in 1851 staked out their railway across the land in question, and in 1853 deposited their plan in the office of the clerk of the peace, and laid the rails and built their station on the land, which was then vested in the Crown; but this was without the consent of Her Majesty, under C. S. C. ch. 66, sec. 11, sub.sec. 31, and they had taken no other proceedings to obtain a right to the possession. In 1854 the Commissioners of Public Works, under 13 & 14 Vic. ch. 13, conveyed the land to the plaintiffs by deed, in which the railway was referred to as a proposed line, and for fourteen years after defendants continued thus to use the land with the knowledge of and without any interference by the plaintiffs: *Held*, that the plaintiffs could not maintain ejectment, but must seek for compensation under "The Railway Act."—*The Corporation of the County of Welland v. The Buffalo and Lake Huron Railway Company*, 147. [Since affirmed on appeal.]

3. *Obligation to fence.*—The Canada Company owned land in the Town of Goderich, through which defendants' railway ran, and on which, being an open common, the cattle of persons living in the town had for thirty or forty years been accustomed to pasture, though without any express permission. The plaintiff's cow having escaped from this land on to the railway, owing to the want of fences, and been killed by a train: *Held*, that he could not recover, for as against him

the defendants were not bound to fence.—*McIntosh v. The Grand Trunk Railway Company of Canada*, 601.

*Receipt for goods, how far an estoppel.*—See **ESTOPPEL**.

See **CARRIERS**.

## RECEIPT.

See **ESTOPPEL**—**MORTGAGE**, 1.—**TENDER**.

## RECTOR.

*Re-entry by landlord to avoid lease.*—See **LANDLORD AND TENANT**.

## REPLEVIN.

1. *Action on replevin bond while replevin pending*—*Application to stay proceedings.*—L. brought replevin for his goods, which C. had distrained for rent. While the action was pending, and before declaration, C. took an assignment of the replevin bond, and sued L. and his sureties thereon. Application was then made to stay proceedings in each case—in the suit on the bond, on the ground that until the determination of the action of replevin the rights of the parties on the bond could not be satisfactorily settled; and in the replevin suit, because it had not been prosecuted according to the bond, of which defendants had obtained an assignment. The defendant in replevin moved also for leave to plead, with other pleas, that the plaintiff had not prosecuted his suit with effect and without delay, and that defendant had sued upon the replevin bond before the plaintiff had declared in replevin.

The Court refused to interfere in either case, for as to the action on the bond, whether the replevin had been prosecuted without delay was a question of fact, which could be tried; and as to the replevin, the plaintiff was at liberty to go on and prosecute it with effect.

The proposed plea was not allowed, as it could be no answer to the action.—*Culham et ux v Love et al.*; *Love v. Culham et al.*, 410.

2. *Refusal to assign replevin bond*—*Action for*—*Plea, recovery by plaintiff from third party.*—Declaration, that the defendant, as sheriff, took from H. and two sureties a bond in \$1800, conditioned for said H. prosecuting with effect and without delay an action of replevin brought by him against the plaintiff: that H. did not so prosecute the suit, nor did he make a return of the goods; and that defendant refused to assign the bond to the plaintiff, whereby the plaintiff was hindered from suing on the bond, and deprived of the means of recovering the value of the goods and the costs, &c.

Plea, as to so much as alleges that the plaintiff is deprived of the means of recovering the value of the goods, that the goods were replevied by defendant from the Great Western R. W. Co., and that the plaintiff afterwards recovered from said Company the full value of such goods in an action against them as common carriers, for non-delivery of said goods.

*Held*, on demurrer, plea bad, for it did not shew that the plaintiff was not delayed in recovering the value of the goods by defendant's refusal to assign, and it was

pleaded to damages only.—*Pacaud v. McEwan*, 550.

### RESERVATION.

*Of life estate in conveyance in fee.*—See DEED.

### RETROSPECTIVE RATES.

See COMMON SCHOOLS, 1—JURORS.

### ROAD COMPANIES.

See TOLLS.

### ROADS.

See HIGHWAYS.

### SALE OF GOODS.

*Sale of plaintiff's goods without authority—Detinue.*—The plaintiff's servant, one O., being in charge of his horses, sold one, without the plaintiff's authority, to the defendant's wife, who had the management of defendant's business, receiving \$20 in cash, and defendant's note for \$55, payable to O. Afterwards, meeting O., the plaintiff got from him the note, and \$17 in cash. The plaintiff demanded the horse from the defendant's wife, and offered her the note and the \$17, which, however, she did not take. He then brought detinue.

*Held*, that the plaintiff was entitled to recover; for that he was not bound to tender to defendant the note and the money he had received, nor could defendant retain the horse until he obtained them, at all events without giving notice that he would do so, after first demanding them.—*Morton v. Stone*, 158.

See INSOLVENCY, 4.

### SALE OF LAND.

See FRAUDS, STATUTE OF.

### SCHOOLS.

See COMMON SCHOOLS.

### SEDUCTION.

*C. S. U. C. ch. 77—Right of action.*—Declaration by husband and wife, that the defendant, after the death of the father of K., seduced said K., then being the daughter and servant of the wife, while the said K. was unmarried, and residing with the defendant, and not with her said mother, whereby the mother lost her services, &c. *Held*, that the declaration was good: that the action would lie; and that it was unnecessary to state that the seduction took place before the mother's second marriage, for it essential to the action the plaintiff, under the declaration, must prove it.—*Hogan and Wife v. Aikman*, 14.

### SHERIFF.

*Sale of lands by, under execution.*—See EXECUTION.

*Trespass against for taking goods—Right to set up jus tertii.*—See JUS TERTII, 1.

### SHIPPING.

1. *Shipment of wheat—Delay in unloading—Liability of consignor—Evidence.*—A cargo of wheat was shipped at Chicago by R. & T., "as agents and forwarders, for account and at the risk of whom it may concern," consigned in the margin "Order Bank of Montreal, for Messrs. Torrance & Co. (the

defendants), care of Glassford, Jones & Co., Kingston." On arriving at Kingston the vessel was detained by G. J. & Co., as the jury found, an unreasonable time in unloading. Defendants, Messrs. T. & Co., paid the freight, enclosing it in a letter to G. J. & Co., in which they spoke of the grain as theirs. *Held*, that there was evidence to shew that T. & Co. were both consignors and consignees, and that in the former capacity, though not in the latter, they were liable for the delay, as upon an implied contract to receive the wheat within a reasonable time.—*Barker v. Torrance et al*, 43.

2. *Charter party—Vessel to proceed with all convenient speed—Construction.*]—Where the plaintiff agreed that his vessel should with all convenient speed sail from Kingston to Dresden or Chatham, to take in a cargo of wheat for Kingston, and she took twenty-seven days to reach Detroit, but the delay arose from no fault of the captain or crew:

*Held*, that he had fulfilled his contract, and that the defendant was not justified in refusing to load her.—*Brown v. Lamont*, 392.

## SHOP LICENSES.

See TAVERN AND SHOP LICENSES.

## STAMPS.

*Promissory Note.*]—A note not properly stamped cannot be used as an acknowledgment to take a case out of the Statute of Limitations, or as evidence of an account stated.—*McKay v. Grinley*, 54.

## STATUTE OF FRAUDS.

*Agreement for sale of land—Part performance—Evidence to connect writings.*]—The defendant wrote to the plaintiff's solicitors that he would give \$3,100 for plaintiff's house and lots, and a few days after he signed the following memorandum: "I will give \$3,500, together with the choice of one horse, wagon, and teaming harness or buggy," to which was added "accepted," with plaintiff's signature. The plaintiff conveyed the land to defendant, who paid the sum required down, and gave a mortgage for the balance, but defendant would not give the horse, &c., for which the plaintiff sued;

*Held*, reversing the judgment of the County Court, that he could not recover: that the contract was within the Statute of Frauds, and being entire, the part performance could not enable the plaintiff to sue for the part unperformed, without proof of a written agreement; and that such proof failed, for parol evidence, which was inadmissible, was required to connect the memorandum with the previous letter, so as to shew the consideration.—*Taylor v. Knowles*, 200.

## STATUTE OF LIMITATIONS.

See LIMITATIONS, STATUTE OF.

## STATUTES.

8 Vic. ch. 82.]—See CORPORATIONS, 1.  
 13 & 14 Vic. ch. 13.)—See RAILWAYS, 2.  
 13 & 14 Vic. ch. 67, Secs. 46, 47.]—  
 See TAXES (SALE OF LAND FOR) 3.  
 18 Vic. ch. 130.]—See JURORS.  
 Con. Stat. C., ch. 66, sec. 11, sub-sec. 31.]—See RAILWAYS, 2.  
 Con. Stat. C., ch. 66, sec. 83.]—See RAILWAYS, 1.  
 Con. Stat. C., ch. 103, sec. 50, sch. I (1).]—See TOLLS.

Con. Stat. U. C. ch. 16.]—*See* WILL.  
 Con. Stat. U. C. ch. 19, sec. 175,]—*See*  
 DIVISION COURTS.  
 Con. Stat. U. C. ch. 22, (C. L. P. Act)  
 sec. 167.]—*See* ARBITRATION AND AWARD.  
 C. L. P. Act, sec. 213.]—*See* EVIDENCE.  
 C. L. P. Act, sec. 258.]—*See* EXECU-  
 TION.  
 Con. Stat. U. C. ch. 27, secs. 17, 18.]—  
*See* EJECTMENT.  
 C. S. U. C. ch. 49, sec. 95.]—*See* TOLLS.  
 C. S. U. C. ch. 55.]—*See* TAXES (SALE  
 OF LAND FOR), 1.  
 C. S. U. C. ch. 57.]—*See* FENCE VIEW-  
 ERS.  
 C. S. U. C. ch. 58.]—*See* MUNICIPAL  
 CORPORATIONS, 3.  
 C. S. U. C. ch. 64, sec. 40.]—*See* COM-  
 MON SCHOOLS, 3.  
 C. S. U. C. ch. 64, sec. 49.]—*See* COM-  
 MON SCHOOLS, 4.  
 C. S. U. C. ch. 77.]—*See* SEDUCTION.  
 C. S. U. C. ch. 125, secs. 9, 10.]—*See*  
 CORONER.  
 27-28 Vic. ch. 17, sec. 9, sub. 2.]—*See*  
 INSOLVENCY, 3.  
 27-28 Vic. ch. 18—*See* MUNICIPAL COR-  
 PORATIONS, 2.  
 27-28 Vic. ch. 18.]—*See* TEMPERANCE  
 ACT, 1864.  
 27-28 Vic. ch. 21.]—*See* HIDES, 1, 2.  
 29 Vic. ch. 72.]—*See* SURVEY, 2.  
 29-30 Vic. ch. 24.]—*See* HIDES, 1, 2.  
 29-30 Vic. ch. 45, D.]—*See* CONVIC-  
 TION, 3.  
 29-30 Vic. ch. 51, secs. 198, 209, 211,  
 220, 269, sub-secs. 9, 10, 11.]—*See* MUNI-  
 CIPAL CORPORATIONS, 3.  
 29-30 Vic. ch. 51, sec. 341, sub-sec.  
 12.]—*See* MUNICIPAL CORPORATIONS, 5.  
 29-30 Vic. ch. 53.]—*See* TAXES, 2.  
 30-31 Vic. ch. 3, B. N. A. Act, sec. 91,  
 No. 27, sec. 92, Nos. 9, 15, 16, Imp.]—  
*See* TAVERN AND SHOP LICENSES, 2.  
 31 Vic. ch. 10, sec. 89 D.]—*See* EXTENT  
 (WRIT OF).  
 32 Vic. ch. 6.]—*See* COUNTY COURT, 1.  
 32 Vic. ch. 6. sec. 126, O.]—*See* TAXES  
 (SALE OF LAND FOR), 2.  
 32 Vic. ch. 32.]—*See* TAVERN AND SHOP  
 LICENSES, 2.  
 32 Vic. ch. 32 O.]—*See* TEMPERANCE  
 ACT, 1864.  
 32 Vic. ch. 46, sec. 6, sub-sec. 2, sec.  
 8.]—*See* FENCE VIEWERS.  
 32-33 Vic. ch. 3, sec. 71.]—*See* CONVIC-  
 TION, 2.  
 32-33 Vic. ch. 16, sec. 9, sub-sec. 2.]—  
*See* INSOLVENCY, 3.

32-33 Vic. ch. 16, sec. 50.]—*See* INSOL-  
 VENCY, 1.  
 32-33 Vic. ch. 16, sec. 60.]—*See* INSOL-  
 VENCY, 2.  
 32-33 Vic. ch. 28, D.]—*See* CONVIC-  
 TION, 3.  
 32-33 Vic. ch. 31, D.]—*See* CONVIC-  
 TION, 3.  
 33 Vic. ch. 23, O.]—*See* TAXES (SALE OF  
 LAND FOR), 4.  
 33 Vic. ch. 23, sec. 4, O.]—*See* TAXES  
 (SALE OF LAND FOR), 3.  
 33 Vic. ch. 27, sec. 2.]—*See* CONVIC-  
 TION, 2.  
 33 Vic. ch. 28, D.]—*See* CONVIC-  
 TION, 3.  
 33 Vic. ch. 26, sec. 6, O.]—*See* MUNI-  
 CIPAL CORPORATIONS, 3.  
 33 Vic. ch. 37.]—*See* HIDES, 2.

## STAYING PROCEEDINGS.

*In replevin.*]—*See* REPLEVIN, 1.

*See* ARBITRATION AND AWARD  
 —DIVISION COURTS.

## SURVEY.

1. *Single or double-fronted con-  
 cession.*]—The first five concessions  
 of a township were surveyed in  
 1797, the lots being 29 chains 87  
 links in width. About 1813, an  
 original post was found by a sur-  
 veyor in front of the fifth conces-  
 sion, by which he determined the  
 limits of the lots, and they had  
 been settled on accordingly. In  
 1821 the remaining concessions  
 were surveyed, under instructions  
 from the Surveyor-General, which  
 directed the several concession  
 lines to be produced, beginning  
 with that between the fifth and  
 sixth concessions, and from the  
 centre of each line at the distance  
 of 50 links each way, right and  
 left, at right angles thereto, the  
 several lots of the width of 29  
 chains 37 links were to be posted.  
 The surveyor, under these instruc-  
 tions, double posted the line be-  
 tween the fifth and sixth conces-

sions, making the lots 29 chains 37 links wide, and patents were afterwards granted for half lots in the concession. It was contended that this made the fifth concession double-fronted, having the lots 29 chains 87 links wide in the front and 29 chains 37 links in rear. One of these patents, however, made the rear half 29 chains 87 links wide, and the Government plans shewed no jog in the side lines of the fifth concession.

*Held*, that the concession was not double-fronted, for the evidence shewed that the whole of it had been surveyed as a single-fronted one in 1797, and the surveyor in 1821 had no authority to change it, if he so intended. — *Murphy v. Healey*, 192.

2. *Township of Hamilton—Survey under 29 Vic., ch. 72—Effect of.*]—The plaintiff owned lot 28 and the defendant lot 27 in the third concession of Hamilton, between which there was no road allowance, and the plaintiff, previous to the survey of that concession made under 29 Vic., ch. 72, had occupied the land in question for more than twenty years. By this survey it belonged to lot 27.

*Held*, *Morrison, J., dissenting*, that the effect of such survey was to fix conclusively the division line between the lots; but

*Held*, also, that the plaintiff's title by possession was not taken away by it. — *Taylor v. Croft*, 573.

See DESCRIPTION OF LAND, 2.

## TAVERN AND SHOP LICENSES.

1. Remarks as to effect of Tavern and Shop License Act of 1868, 32 Vic. ch. 32, Ont., upon the Tempe-

rance Act, 1864. — *In re Mottashed and The Corporation of Prince Edward*, 74.

2. *Powers of Dominion and Local Legislatures.*—*B. N. Act, sec. 91, No. 27; sec. 92, Nos. 9, 15, 16—Criminal law.*]—The Legislature of Ontario having passed an Act to regulate tavern and shop licenses, 32 Vic. ch. 32, under the power given to them by the British North America Act, 1867, sec. 92, Nos. 9, 16: *Held*, that they had power, under No. 15, to enact that any person who, having violated any of the provisions of the Act, should compromise the offence, and any person who should be a party to such compromise, should on conviction be imprisoned in the common gaol for three months; and that such enactment was not opposed to sec. 91, No. 27, by which the criminal law is assigned exclusively to the Dominion Parliament. — *Regina v. Boardman*, 553.

See TEMPERANCE ACT, 1864.

## TAXES.

*Distress—Trespass.*]—One N. S., the plaintiff's son, was assessed in 1868 as a freeholder for \$450 on real estate and \$200 on personal property, and was on the collector's roll for county rate \$9.75, school \$7.02, township rate \$2.60, and dog tax \$2—in all \$21.37. The rate did not appear on the collector's roll, and the collector was not aware how much was for real and how much for personal property. He demanded the taxes from the plaintiff, to whom N. S. had made an assignment in August, 1868, and the plaintiff offered to pay him the tax on the real estate only, but he tendered no money and required a

receipt in full for the real property. The defendant thereupon seized on the premises goods which had belonged to N. S., and the plaintiff brought trespass.

*Held*, that he could not recover, for it was not shewn, and the Court would not assume, that any part of the amount seized for was for personal property except the \$2 dog tax; and this sum being severable, and the other sums not tendered, his seizing for it with the rest would not vitiate the whole distress.

*Held*, also that a demand upon the plaintiff was sufficient.—*J. L. Squire v. Mooney*, 531. \*

2. *Held*, that the effect of the 29-30 Vic. ch. 53, was to abolish the distinction between the mode of assessment in cities and counties both for the purposes of the Jurors' Act and otherwise.—*The Corporation of the County of Frontenac v. The Corporation of the City of Kingston*, 584.

See COMMON SCHOOLS, i.—JURORS.

## TAXES (SALE OF LAND FOR).

1. *Lands in cities*—*C. S. U. C. ch. 55.*—Under Consol. Stat. U. C. ch. 55, the chamberlain and high bailiff in cities had power only to sell the lands of *non-residents* for arrears of taxes.

A sale in 1865, of land belonging and assessed to a resident, was therefore held invalid.—*McKay v. Bamberger et al.*, 95.

2. 32 Vic. ch. 6, sec. 126, O.—*Sale under treasurer's warrant*—*Liability of County.*—Section 126 of the Assessment Act, O., 32 Vic. ch. 6, directs, that when the county trea-

surer is satisfied that there is distress upon any lands of non-residents in arrear for taxes, he shall issue a warrant *under his hand and seal* to the collector of the municipality to levy. The warrant was tested "Given under my hand and seal, being the corporate seal;" and the seal bore the same form, emblem, legend, &c., as the County seal. The collector sold the plaintiff's goods under it, but it was not shewn to have been authorized by the county council, nor had they received the proceeds of the sale:

*Held*, that they were not liable in trespass or trover.—*Snider v. The Corporation of the County of Frontenac*, 275.

3. *Tax Sale in 1855*—*Objections to*—13 & 14 Vic. ch. 67—33 Vic. ch. 23, O.]—An action of ejectment to try the validity of a tax title having been begun before the 33 Vic. ch. 23, O., was passed, the Court, under sec. 4, determined the objections taken to the sale, in order to settle the right to costs, in the same manner as if the Act had not been passed.

The Sheriff, at a tax sale, on the 26th of December, 1855, notified the purchasers that if they did not pay in two or three weeks he would sell the land again. The defendant having purchased portions of certain lots did not pay, and the lots were put up again as whole lots, not by the acre. The defendant then asked those present not to bid, as he had a title to the lots bid off by him at the first sale, which he wished to perfect. Accordingly, no one bid against him, and he obtained the lots. What his title was did not appear. *Semble*, that the sale under such circumstances

could not be supported; but no opinion was given on this point, as the plaintiff might, under *Raynes v. Crowder*, 14 C. P. 111, be compelled to go into Chancery for relief on such a ground.

*Held*, that the 13 & 14 Vic. ch. 67, secs. 46 and 47, did not make the list of taxes directed to be prepared by the Treasurer binding; and that if the tax was not legally imposed, but merely debited against the lot by the Treasurer, it was not made valid by being entered in such list.

*Semble*, that the advertisement was bad, for not specifying whether the lands were patented or held under a lease or license of occupation.

It was objected also that the land was sold for taxes which had accrued for more than twenty years, and that the sale was adjourned illegally, though a large number of bidders were present. *Semble*, that these objections could not be supported.—*McAdie et al. v. Corby*, 349.

4. *Semble*, that several objections taken to the tax title, and set out in this case, were cured by the 33 Vic. ch. 23, O.—*Davis et al v. Vannorman*, 437.

#### TEMPERANCE ACT, 1864.

Remarks as to the effect of the Tavern and Shop License Act of 1868, 32 Vic., ch. 32, Ont., upon the Temperance Act of 1864.—*In re Mottashed and The Corporation of Prince Edward*, 74.

See MUNICIPAL CORPORATIONS, 2.

#### TENDER.

*Demand of receipt.*]—Where on tendering payment of money due upon mortgage a receipt was required, and the plaintiff did not

object on that ground, but gave a different reason for refusing to receive the money. *Held*, that the tender was good.

The above tender was made on the 14th April, the day when the money fell due, and on the following day it was again tendered and refused because a receipt was insisted upon.

*Held*, not to support the plea of tender on the 14th, for it was after the day; but that, to avoid the effect of the previous tender, the plaintiff should have demanded the exact sum before offered.

*Per Morrison, J. and Wilson, J.*, a person tendering money is entitled to require a receipt: *Richards, C. J.*, doubting.—*Lockridge v. Lacey et al*, 494.

#### TITLE.

*Liability of Attorney for investigation of.*]—See ATTORNEY.

#### TOLLS.

*Conviction for not paying tolls*—C. S. U. C. ch. 49.]—A conviction under Consol. Stat. U. C. ch. 49, sec. 95, stating that defendant wilfully passed a gate without paying and refusing to pay toll: *Held*, good. *Quære*, whether it would be sufficient to allege only that he wilfully passed without paying, without in any way shewing a demand.

*Held*, also, that the non-exemption of defendant, if essential to be alleged, was sufficiently stated in the conviction.

*Held*, also, the general form prescribed by Con. Stat. C. ch. 103, sec. 50, Sched. I, (1), being used, that it was clearly not requisite to shew that defendant was summoned or heard, or any evidence given.

*Held*, also, unnecessary to name any time for payment of the fine, as it would then be payable forthwith.

It was objected also; 1. That M. the keeper and lessee of the gate, had no authority to exact toll; 2. That the corporation had been dissolved; 3. That no board of directors had been appointed since 1866; 4. That if legally appointed they could not lease the gate; 5. That the lease to M. had expired; 6. That he could not take advantage of the penal clauses in the Act; 7. That it was not shewn that any tolls had been fixed: but *Held*, that these objections could not be taken, for where, assuming the facts to be true, the magistrate has jurisdiction, the conviction only can be looked at.

*Held*, also, as to objections 1, 4, and 6, that they were otherwise untenable; and as to Nos. 2, 3, and 5, that the existence of the corporation could not be enquired into on this application to quash the conviction.—*The Queen v. Caister*, 247.

See MUNICIPAL CORPORATIONS 3, 4.

### TRESPASS.

*Trespass and trover*—*Several defendants—Joint verdict.*—In trespass and trover against five defendants, for taking and converting a steam boiler, it appeared that one defendant, P., had nothing to do with the original taking, but that it had been placed in his yard by the others, or by some of them, not acting in concert with him, and that he had afterwards refused to give it up to the plaintiff. At the trial, the plaintiff's counsel declined to elect, but went to the jury against all the defendants, claiming exemplary damages, and a general verdict was rendered.

The Court ordered a new trial without costs, and refused to allow the verdict to stand against P. alone *Menton v. Lee, Sawyer, Carolan, McLean, Patterson, and West*, 281.

*Right of defendant to set up jus tertii.*—See JUS TERTII.

See INSOLVENCY, 1.

### TRESPASSER.

*Ejectment against*—*Notice under C. S. U. C. ch. 27 sec. 17.*—See EJECTMENT.

### TROVER.

*Evidence of conversion.*—Defendant P. having a chattel mortgage which did not cover the piano in question, authorized A., as his bailiff, to sell the goods mortgaged, and A. was also authorized by the landlord of the mortgagor to distrain for arrears of rent. Under the distress warrant A. seized and advertised the piano, but was directed by the landlord not to sell it. He applied to P. as to the sale of the piano, who referred him to his attorney, and he afterwards sold it, and paid the proceeds to P., who had knowledge of all the facts, and who he said had indemnified him: *Held* that P. was liable with A. in trover for the piano.—*Stevens v. Pennock and Armstrong* 5.

### VARIANCE.

*In name of Corporation.*—See CORPORATIONS, 1.

### VELOCIPEDE.

*Use of on sidewalk*—“Obstruction”]—The use of a velocipede on a sidewalk, though no one be near it, may be an obstruction, within

the provision of a by-law that no person shall by any vehicle encumber or obstruct the sidewalk.—*Regina v. Plummer*, 41.

### VERDICT.

*Trespass*—*Several defendants—Evidence of joint liability.*]—See TRESPASS.

### WAREHOUSE RECEIPTS.

See INSURANCE, 3.

### WATER-COURSES.

*Artificial channel—Penning back water.*]—The plaintiffs owned land on the River Humber, on which there was a mill, the water from which flowed through an artificial channel of about 700 feet into the river. Defendant having built a dam by which the water was pened back in this channel, so as to obstruct the working of plaintiffs' mill and the natural flow of the stream:

*Held*, that the plaintiffs were clearly entitled to maintain an action therefor.—*Wadsworth et al. v. McDougall*, 369.

*Municipalities divided by a river—Boundaries.*]—See MUNICIPAL CORPORATIONS, 4.

### WAY.

See HIGHWAYS.

### WILL.

Where a probate is used as evidence, under C. S. U. C. ch. 16. It is evidence of the testator's death, as well as of the will.—*Davis et al v. Vannorman* 437.

### WITNESSES.

See CORONER.

### WORDS, (CONSTRUCTION OF.)

"Obstruction."—See VELOCIPED.

"Disposing of"—See HIDES, 2.

### WORK AND LABOUR.

*Previous letter naming price, Construction of.*]—The formation of a Street Railway Company being in contemplation, the plaintiffs, in January, 1867, wrote to K., saying that tamarac wood required for it could be got then, but not later, delivered at their mill at a price specified, and they, the plaintiffs, would saw it for not over \$3 per M., perhaps less; and they added that if K. would start the stock list with \$5,000, they would venture to order the wood, and would agree to get the balance of stock taken. K. said that upon this, after communicating with the plaintiffs, he took the \$5000 stock, and the plaintiffs ordered the wood, and the company was formed, of which K. was made president. The sawing was not done until 1868, and the plaintiffs sued the Company for it, claiming \$4 25 per M. The case having been tried without a jury:

*Held*, the letter was properly treated as fixing the price to be paid at not more than \$3 per M.

*Quere*, whether, if there had been no communication with the plaintiffs after the letter, the defendants could have claimed the benefit of it as a representation intended to have been communicated to them, and on which they acted.—*Currier et al. v. The Ottawa City Passenger Railway Co.*, 61.









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